

## After the Battle of the Forms: Commercial Contracting in the Electronic Age

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**Abstract:** Commercial parties continue to fight the battle of the forms, but electronic contracting is quickly rendering this practice obsolete. In this article I assess the legal landscape for commercial parties after the battle of the forms. In Section I, I briefly describe the (relatively) settled law under U.C.C. § 2-207. I then describe how these rules permit commercial parties to erect a force-field to protect themselves from being subjected to unwanted terms, and the developments in web-based contracting and recent case law applying contract formation principles to electronic contracting. Finally, I discuss how the growth of electronic contracting will eliminate the battle of the forms that triggers the application of U.C.C. § 2-207, and also will make it difficult for commercial parties to replicate the force-field protection to which they have grown accustomed.

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In Section II, I discuss the two primary doctrinal options available to address contracting realities for commercial parties once the electronic age of contracting has eliminated the battle of the forms. The debacle surrounding Revised Article 2 suggests that the only plausible response, as the theater of operations shifts from the battle of the forms to the world of electronic contracting, will be judicial rather than legislative. Although unconscionability analysis might be a plausible doctrine to address egregious cases, I conclude that the doctrine is too closely aligned with consumer protection to make it a viable theory for commercial parties. Instead, I argue that rehabilitating the doctrine of reasonable expectations holds the most promise for addressing the commercial contracting world after the battle of the forms. This approach enjoys the benefit of being grounded in Karl Llewellyn's theory of the validity of standard form contracts, is consonant with one of the important guiding principles of Article 2, and will be sufficiently defined by the commercial context to permit consistent application by courts policing the margins of acceptable contracting practices.

I know of few “private” law problems which remotely rival the importance, economic, governmental, or “law”-legal, of the form-pad agreement; and I know of none which has been either more disturbing to life or more baffling to lawyers.

Karl Llewellyn<sup>1</sup>

## I. INTRODUCTION

Commercial parties continue to fight the “battle of the forms” by exchanging documents that do not mirror each other as their mode of contracting.<sup>2</sup> The number of cases that raise questions under U.C.C. § 2-207 may be small compared to the number that arose thirty years ago, but this decrease undoubtedly is explained in part by the

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<sup>1</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362 (1960).

<sup>2</sup> Recent cases that address classic “battle of the forms” issues arising out of the exchange of form documents during the contracting process are: *Corestar Int’l Pte. Ltd. v. LPB Comm’n, Inc.*, 513 F. Supp. 2d 107 (D.N.J. 2007); *Smith & Loveless, Inc. v. Caicos Corp.*, 471 F. Supp. 2d 1140 (D. Kan. 2007); *Stemcor USA, Inc. v. Trident Steel Corp.*, 471 F. Supp. 2d 362 (S.D.N.Y. 2006); *Deere & Co. v. Ohio Gear*, 462 F.3d 701 (7th Cir. 2006); *Nartron Corp. v. Tuthill Corp.*, No. 05-70323, 2006 WL 1494992 (E.D. Mich. May 25, 2006); *Gen. Steel Corp. v. Collins*, 196 S.W.3d 18 (Ky. App. 2006); *Converting/Biophile Labs. v. Ludlow Composites Corp.*, No. 2005AP1628, 2006 WL 626308 (Wis. Ct. App. Mar. 15, 2006); *Chainworks, Inc. v. Webco Indus., Inc.*, No. 1:05-CV-135, 2006 WL 461251 (W.D. Mich. Feb. 24, 2006); *Plastech Engineered Prods. v. Grand Haven Plastics, Inc.*, No. 252532, 2005 WL 736519 (Mich. Ct. App. Mar. 31, 2005); *Nw. Aluminum Co. v. Hydro Aluminum Deutschland GmbH*, No. Civ. 02-398-JE, 2003 WL 23571744 (D. Or. Sept. 23, 2003); *Flender Corp. v. Tippins Int’l, Inc.*, 830 A.2d 1279 (Pa. Super. Ct. 2003); *AgGrow Oils, L.L.C. v. Nat’l Union Fire Ins. Co.*, 276 F. Supp. 2d 999 (D.N.D. 2003); *Aceros Prefabricados, S.A. v. Tradearbed, Inc.*, 282 F.3d 92 (2d Cir. 2002); *Elec. Techs. Int’l, L.L.C. v. Bennett Pump Co.*, No. 01-C-0553-C, 2002 WL 32349389 (W.D. Wis. Apr. 15, 2002); *Richardson v. Union Carbide Indus. Gases, Inc.*, 790 A.2d 962 (N.J. Super. Ct. App. Div. 2002).

Of course, § 2-207 is also triggered when there is only a single form document that is submitted in response to an order or an oral agreement. Recent cases include: *Scotwood Indus. Inc. v. Frank Miller & Sons, Inc.*, 435 F. Supp. 2d 1160 (D. Kan. 2006); *Posh Pooch Inc. v. Nieri Argenti s.a.s.*, No. 106419/2005, 2006 WL 435808 (N.Y. Sup. Ct. Feb. 23, 2006); *Hansen-Rice, Inc. v. Celotex Corp.*, 414 F. Supp. 2d 970 (D. Idaho 2006); *In re Cotton Yarn Antitrust Litig.*, 406 F. Supp. 2d 585 (M.D.N.C. 2005); *S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F.3d 667 (7th Cir. 2002). Some courts have erred by concluding otherwise in direct contravention of the statute. *See, e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (“Our case has only one form; UCC § 2-207 is irrelevant.”).

successful effort by courts to clean up the worst features of the statutory mayhem known as § 2-207. As the judicially-massaged rules of § 2-207 came into sharper focus, it stands to reason that litigation would decrease.

In light of the tremendous expansion of the Internet's commercial role, the relative quiet on the "battle of the forms" front might be explained by another reason. Commercial parties have increasingly stopped exchanging forms as their mode of contracting or as their method for confirming an agreement; they choose instead to place and receive orders through web applications. In this new environment, the battle of the forms may be irrelevant to commercial transactions. This article will assess the legal landscape for those commercial parties that have stopped fighting the battle of the forms.

In Section II, I argue that the battle of the forms between commercial parties may become a relic of the twentieth century. First, I provide a very brief overview of the (relatively) settled law under § 2-207. I emphasize that the significant practical effect of § 2-207 is not only to permit commercial parties to erect a "force-field" to protect themselves from being subjected to unwanted terms on the other party's form, but also to validate both parties' forms to some extent, even when they are not effective, in themselves, to create contractual liability. Next, I describe developments in web-based contracting and recent case law that applies contract formation principles to electronic contracting. I conclude by suggesting that click-wrap agreements could eliminate the battle of the forms and thereby undermine § 2-207's important role. Finally, I describe why the efforts by parties to obtain the "force-field" protections of § 2-207 in this new contracting environment are unlikely to succeed.

In Section III, I discuss the primary doctrinal alternatives available to address the contracting realities that commercial parties will face if the electronic age of contracting eliminates the battle of the forms. First, I consider whether courts might use an unconscionability analysis to protect commercial parties from overreaching. Although plausible in egregious cases, the practice of limiting the unconscionability doctrine to protecting consumers is so ingrained that a general application of the doctrine in the commercial setting is very unlikely. Instead, I suggest that rehabilitating the doctrine of reasonable expectations can best address the problems created by electronic contracting. This approach enjoys the benefit of being grounded in Karl Llewellyn's theory of the validity of standard form contracts, and it is one of the important guiding principles of Article 2. My approach to reasonable expectations will be sufficiently defined by the commercial context to permit consistent application by

those courts who are called upon to police the margins of acceptable contracting practices.

I conclude that the advent of paper standard form contracts posed problems for the law of contracts which § 2-207 has effectively addressed in a manner that promotes the reasonable expectations of the commercial parties involved. As contracting practices move away from the battle of paper forms, and therefore outside the scope of § 2-207, courts will need to protect commercial parties' reasonable expectations more directly.

## II. THE END OF THE BATTLE OF THE FORMS

### A. THE (NEARLY) SETTLED LAW UNDER § 2-207 FOR THE BATTLE OF THE FORMS

The commercial reality that motivated Karl Llewellyn to draft § 2-207 is well known: businesses generally contract by reaching agreement only as to the key, material terms of a deal<sup>3</sup>; they then exchange form documents to show that they are closing the deal.<sup>4</sup> Although § 2-207 is universally derided for its incoherence, judicial decisions have created a relatively stable body of law that successfully abandons the common law "mirror image rule" by holding that the mere fact that parties exchange documents that differ from each other (even in material ways) does not prevent those documents from creating a contract if the parties have so intended. Determining the terms of the resulting contract is a bit trickier, but courts generally have applied a "knockout" rule to terms that conflict,<sup>5</sup> and they follow

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<sup>3</sup> Generally, parties will agree expressly to a description of the goods, the price, and the delivery terms, although they need not reach even this degree of specificity in order to have an enforceable agreement under Article 2. See U.C.C. § 2-204.

<sup>4</sup> A sales contract may be made "in any manner sufficient to show agreement." U.C.C. § 2-204(1) (2000). However, a sales contract "does not fail for indefiniteness" even though the parties have failed to show agreement on all the terms, so long as they have shown that they intend to be bound and have agreed to enough terms to permit a court to award a remedy for breach. *Id.* § 2-204(3).

<sup>5</sup> The courts have developed an approach to deal with conflicting terms in the forms used by parties to create the contract, analogizing to the "knockout" rule of U.C.C. § 2-207 cmt. 6 (2000), regarding confirmatory memoranda. See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1578–80 (10th Cir. 1984) (describing the various interpretive approaches available to courts); *Flender Corp. v. Tippins Int'l. Inc.*, 830 A.2d 1279, 1285–87 (Pa. Super. Ct. 2003) (noting the strong support for the knockout rule and endorsing *Daitom's* prediction regarding how Pennsylvania would construe § 2-207).

the rule of § 2-207(2) for terms that are additional to the terms on the other form. Although there was a great deal of hermeneutical angst leading to the settled reading of the statute, the end result is relatively straightforward. The parties' forms can create a contract, despite the lack of symmetry that would demonstrate complete assent. The terms of the resulting agreement include those terms as to which there is demonstrated assent, together with terms that could reasonably be expected to govern the relationship (consisting of immaterial additions on either party's form, and the statutory gap-fillers).

Section 2-207, as originally drafted, did not comprehensively address the battle of the forms. The drafters recognized that it would be stretching the idea of assent to conclude that a document could operate as an acceptance even though it "expressly" made acceptance "conditional on assent to the different or additional terms" in the form.<sup>6</sup> In 1966, § 2-207 was amended by adding subsection (3) and its

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<sup>6</sup> U.C.C. § 2-207(1) (2000). Put simply, this provision permits a party to use a document to make a counter-offer in response to a document received from the other party, and is, therefore, unexceptional and necessary. Formalist courts tend to enforce boilerplate declarations, in which the party sending the second form proclaims that its assent is "expressly conditioned" on the other party's acceptance of its terms. See, e.g., *C. Itoh & Co., Inc. v. Jordan Int'l Co.*, 552 F.2d 1228, 1235-36 (7th Cir. 1977) (boilerplate tracking the "expressly conditional" language of § 2-207 is effective to prevent assent). However, even if the forms do not establish assent, the courts agree that § 2-207 does not permit the party sending the second form to obtain its terms; instead, recourse must be had to § 2-207(3) in those cases where conduct makes clear the agreement of the parties. *Id.* at 1236. The terms of the contract are those on which the forms of the parties agree, as well as all other terms imposed by Article 2. Courts have construed these terms as including agreement by course of performance, course of dealing and trade usage, in addition to the gap-filler provisions. See *Dresser Indus. v. Gradall Co.*, 965 F.2d 1442, 1451-52 (7th Cir. 1992) (extending the rule announced in *Itoh*). Subsection (3) thereby ensures the enforcement of the reasonable expectations of the parties when their conduct establishes that they have an agreement, despite the failure of their writings to do so.

The better approach to the question of whether the second form constitutes a true counter-offer is adopted by the court in *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir. 1972), in which the court held:

[I]t is not enough that an acceptance is expressly conditional on additional or different terms; rather, an acceptance must be expressly conditional on the offeror's assent to those terms. Viewing the Subsection (1) proviso within the context of the rest of that Subsection and within the policies of Section 2-207 itself, we believe that it was intended to apply only to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms therein.

*Id.* This reading of § 2-207(1) attempts to distinguish boilerplate language that does not accurately reflect the unwillingness of the party to be bound from language in a form that

related Official Comments. Under this provision, conduct by both parties indicating the recognition of an agreement “is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.”<sup>7</sup> The provision then specifies the means for determining the terms of such an agreement. As under § 2-207(2), the terms of the agreement under § 2-207(3) are determined by the reasonable expectations of the parties, and include the “terms on which the writings of the parties agree,” together with any gap-filling provisions. Thus, the forms that are exchanged do not lose their significance even if they are insufficient on their face to close the deal. However, by withholding assent in the form documents, the parties lose the opportunity for differing nonmaterial terms in their respective forms to become part of the agreement.

Although Karl Llewellyn clearly intended to overcome the “mirror image rule” and the “last shot rule” that dominated the unrealistic formalism of the classical common law model of contract, the practical benefit of § 2-207 provides commercial parties with an affirmative contracting strategy. The section ensures that reasonable expectations are respected, even when the parties do not expressly agree on many terms of the deal. Section 2-207 empowers commercial parties by allowing them to avoid undesirable terms by

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expressly states the party’s genuine and conscious refusal to proceed with a contract unless its terms are accepted. The benefit of this approach is that it more closely tracks the reasonable expectations of the parties by enforcing more terms from their battling forms (not just terms in common, but also nonmaterial terms that do not appear in the other form). This approach also acknowledges that the exchange by commercial parties of forms that both proclaim to withhold assent unless the other party agrees to all of the terms in the form is not worthy of judicial respect unless the party otherwise acts accordingly.

<sup>7</sup> U.C.C. § 2-207(3) (2000). Comment 7 explains that in many cases, the conduct of the parties makes clear that there is a contract, so the only matter to be resolved is specifying the terms of their agreement. The fact that the exchange of forms did not in itself create contractual liability is irrelevant to the formation question, since U.C.C. § 2-204(2) makes clear that it is unnecessary to identify a distinct offer and acceptance to specify the moment at which the parties became contractually bound. The statute makes clear that “conduct by both parties” can show that a contract exists, and so this provision is not limited only to those cases in which the parties have performed their obligations, despite the absence of agreement. See *Lam Research Corp. v. Dallas Semiconductor Corp.*, Nos. Ho27073, Ho27366, Ho28003, 2006 WL 1000573 (Cal. Ct. App. Apr. 17, 2006) (seller had constructed two of the six tools); *Apex Oil Co. v. Vanguard Oil & Servs. Co., Inc.*, 760 F.2d 417 (2d Cir. 1985) (request by seller to extend delivery date and its buyer’s application to a bank for financing the purchase was conduct sufficient to show agreement). Specifically, a court may consider conduct prior to the exchange of boilerplate documents that ostensibly withhold assent when determining whether an agreement exists. See *Axelsson, Inc. v. McEvoy-Willis*, 7 F.3d 1230, 1233 (5th Cir. 1993); *Nat’l Controls, Inc. v. Commodore Bus. Machines, Inc.*, 163 Cal. App. 3d 688, 693–94 (1985).

creating a conflict with the other party's form, resulting in the enforcement of gap-filling terms under the "knock-out" rule. Forms operate like a commercial law "force-field" in that a party can screen out unwanted terms by raising its own form as a shield against the other party. Thus, the party that does not want to arbitrate its disputes will put a choice of forum term in its form.

If the other party does not respond with a "force-field" form of its own, the choice of forum term will control. If the other party does include a dispute resolution clause, the effects of the force-fields will neutralize each other and the gap filler provision will provide the enforceable dispute resolution term for the contract. Under Article 2, the parties have an effective means to protect themselves against terms that deviate from the reasonably expected gap-filling baseline in material ways without having to worry that their non-mirroring forms will interfere with the formation of an enforceable contract. This monumental conceptual advance in the law of contracts has served businesses well over the past forty years, despite the inelegant and opaque presentation of § 2-207 and the resulting tidal wave of litigation.<sup>8</sup>

There is no need to wade deeper into the complexities of § 2-207 for the purpose of this article. Too much ink by scholars (not to mention too much blood by litigators) has already been spilled in this endeavor. The important point is that the courts, admittedly with some missteps and confusion, acceptably resolved the problem of the "battle of the forms" by respecting the reasonable expectations of the

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<sup>8</sup> As one court famously summarized, there is wide recognition that § 2-207 is not a model of clarity and precision:

In reviewing this determination by the District Court, we are aware of the problems which courts have had in interpreting Section 2-207. This section of the UCC has been described as a "murky bit of prose," *Sw. Eng'g Co. v. Martin Tractor Co.*, 205 Kan. 684, 694, 473 P.2d 18, 25 (1970), as "not too happily drafted," *Roto-Lith Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497, 500 (1st Cir. 1962), and as "one of the most important, subtle, and difficult in the entire Code, and well it may be said that the product as it finally reads is not altogether satisfactory." DUESENBERG & KING, *SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE* (Vol. 3, Bender's Uniform Commercial Code Service) § 3.03, at 3-12 (1969). Despite the lack of clarity in its language, Section 2-207 manifests definite objectives which are significant in the present case.

*Dorton*, 453 F.2d at 1165.



parties.<sup>9</sup> Unfortunately, courts have finally resolved how best to implement § 2-207 just as its relevance to commercial contracting is waning.

## B. DEVELOPMENTS IN WEB-BASED CONTRACTING AND THE EMERGING LEGAL REGIME

When a commercial party submits an order on a supplier's website, there would appear to be no battle of the forms, thus rendering § 2-207 irrelevant to the transaction. Manufacturers are developing increasingly sophisticated inventory control, production management, and supply-chain integration, all of which require computerized order management. Naturally, this leads sellers to encourage online transactions through web applications because this method eliminates the need for any data to be input by the seller.<sup>10</sup> The same dynamic holds true for many buyers as well: a large manufacturer benefits if it purchases raw materials and component parts by means of highly sophisticated software that invites approved sellers to make offers on the buyer's website, subject to the buyer's terms and conditions.

Web-based contracting enables the buyer to integrate its purchasing needs with nearly simultaneous offers from designated sellers. The fact that this contracting process also allows the buyer to obtain its posted terms while avoiding the battle of the forms may just

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<sup>9</sup> The accumulated wisdom of decades of litigation generally has been gathered in Amended Article 2 (2003), proposed by the Uniform Law Commission ("ULC") [formerly known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL")], but Amended Article 2 has been ignored by the states. Amended § 2-207 wisely separates contract formation principles from § 2-207 and adds them to Amended § 2-206, and it makes clear that the "knockout" rule applies generally. Unfortunately, Amended § 2-207 dodges the all-important question of "shrink-wrap" terms (see Amended Cmt. 5) and also eliminates the sensible rule that additional terms in one form can enter the agreement if they do not materially alter the agreement and the other party has not effectively protested (either prospectively or after receiving the form with the additional term).

<sup>10</sup> A personal (consumer) experience confirms how important these web applications may be for contemporary businesses. I recently ordered a deluxe fruit basket for a relative over the Internet, but, as soon as I completed the order, I realized that I had made a mistake with regard to the delivery date. I immediately e-mailed and telephoned customer service, advising them of the mistake. The customer service representative assured me that I would not be charged for my original (incorrect) order, but also said that the company had no effective means of canceling the order, even though the scheduled delivery date was nearly two weeks away. Rather than interrupt the computerized fulfillment of the order, it made more sense for the company to absorb the loss. So, my relative received two deluxe fruit baskets for the price of one (and I received two thank-you notes).

be a collateral benefit to the business advantages of contracting in this manner. The advantages of computerized contracting are magnified in many industries where large parties both purchase from, and sell to, other commercial parties.

As companies further transition to web-based inventory control and ordering, we will see fewer battles involving forms. Although it might appear that avoiding the dreaded "battle of the forms" promises to restore clarity and certainty to contract law, the resulting regime's prevailing doctrine may need some adjustments before it proves to be acceptable to, and appropriate for, commercial parties. In this Section, I first provide a brief historical overview of the legal analysis of this emerging contracting reality before discussing desirable changes in the application of contract law doctrines.

An initial step toward Internet contracting was the so-called "shrink-wrap" cases where sellers concluded deals with respect to the dickered terms and then delivered the goods to the buyer with voluminous standard terms included inside the box. Without the typical order-acknowledgement contracting, these cases generated a great deal of controversy and uncertainty in the law.<sup>11</sup> This scenario

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<sup>11</sup> "Shrink-wrap" contracts posed difficulties for courts because the time of contracting, ostensibly irrelevant under § 2-204(2), was subject to dispute and interpretation; here it became vitally important in deciding whether the agreement included the terms contained inside the (sometimes metaphorical) shrink-wrap. *See, e.g.,* Kloczek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1338 (D. Kan. 2000) (noting that the results in the cases turn, at least in part, on "whether the court finds that the parties formed their contract *before* or *after* the vendor communicated its terms to the purchaser"). In my Sales casebook, I have characterized this mode of contracting as moving from the "battle of the forms" to the "attack of a single form." *See* FRANCIS J. MOOTZ III, DAVID FRISCH & PETER A. ALCES, COMMERCIAL CONTRACTING: SALES, LEASES, AND COMPUTER INFORMATION 135 (LexisNexis 2004). Case law includes vigorous debate as to whether these scenarios implicate § 2-207. Some courts have famously held that the parties had concluded their contracting before the shrink-wrap terms were introduced, and, therefore, the terms must be assessed as "additional" terms under § 2-207. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991) (holding that an in-box license must be analyzed as additional terms under § 2-207, and finding that the shrink-wrap terms were not a counteroffer accepted by the buyer but instead were additional terms that entered the agreement only if they were not material); U.S. Surgical Corp. v. Orris, Inc., 5 F. Supp. 2d 1201 (D. Kan. 1998); Ariz. Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993); Wachter Mgmt. Co. v. Dexter & Chaney, Inc., 144 P.3d 747 (Kan. 2006); Lively v. IJAM, Inc., 114 P.3d 487 (Okla. App. 2005); and Licitra v. Gateway, Inc., 734 N.Y.S.2d 389 (N.Y. City Civ. Ct. 2001). Other courts have concluded that the agreement was not formed until the terms in the box arrive; therefore, the shrink-wrap terms become part of the contract through the recipient's manifestation of assent by keeping the goods. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000) (*en banc*). For a particularly detailed critique of "terms later" contracting as recognized in *ProCD* and *Hill*,

quickly moved beyond the literal case of documents located within a shrink-wrapped box to situations in which an order was placed (by telephone or on a website) and the terms were made available to the customer at a later point, leading commentators to characterize this method of forming the contract as ongoing or “rolling.”<sup>12</sup> Courts were divided about how to assess this new contracting environment. While most courts were wary of adding terms to the deal in the absence of manifest consumer assent, some courts began with the presumption that the requirements of the modern economy made it necessary for the law to move in precisely this direction. Fortunately, in the era of web-based ordering, there simply is no need for sellers to use “terms later” contracting that is subject to the inconsistent judicial treatment of so-called “shrink-wrap” terms; the playing field has moved to a more seller-friendly Internet venue.

A commercial buyer is likely to find Internet ordering every bit as convenient as the millions of consumers who order from Amazon.com and other online companies.<sup>13</sup> When a buyer submits an order on the seller’s website, the seller is able to present its standard terms and conditions (in the form of a hyperlink, or inside a text box that contains the terms which may be read with a scroll bar) to the buyer as part of the initial contract formation, rather than after the sale in

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see Roger C. Bern, “*Terms Later*” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, Judge Easterbrook *Notwithstanding*, 12 J.L. POL’Y 641 (2004).

<sup>12</sup> See generally Steven E. Friedman, *Improving the Rolling Contract*, 56 AM. U. L. REV. 1, 4–7 (2006) (characterizing “rolling contracts” as those in which at least some of the terms are presented later, including, but not limited, to the classic shrink-wrap situation). For example, in *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001), a group of consumers brought a class action, complaining that damaging configurations to their computers occurred during the downloading process and before the terms of service were made available for the consumer to read and then click “I agree.” This case is probably best viewed as a “shrink-wrap,” terms-to-follow case, despite the fact that the product in some cases was downloaded from the Internet. The court noted that the damage occurred before the terms were presented, and even then the consumer was forced to change the default selection and click an alternate icon twice to get to the screen that displayed the terms of service, which could, of course, be rejected only after the alleged damage had occurred.

<sup>13</sup> I could not locate data regarding the prevalence of online ordering by commercial parties, but the volume of retail e-commerce is probably a useful proxy for the growing importance of such ordering. According to the U.S. Census Bureau of the Department of Commerce, the U.S. retail e-commerce sales estimate for the third quarter of 2007 is \$36.2 billion. Although this represents only 3.5% of all retail sales, there is continuing strong growth in e-commerce every quarter. See U.S. Dep’t of Commerce, U.S. Census Bureau, *Quarterly E-Commerce Sales, 4th Quarter 2007* (Feb. 15, 2008), <http://www.census.gov/mrts/www/data/html/o7Q4.html>.

the form of documents included with the goods. It was immediately apparent to courts that this situation was different from the scenario presented in the shrink-wrap cases. Courts began characterizing transactions as “browse-wrap” agreements when the terms were referenced on the website accessed by the buyer, and as “click-wrap” agreements when the buyer was required to “accept” the terms actively by clicking an “I agree” icon.<sup>14</sup>

A number of courts refused to enforce terms that were offered in browse-wrap fashion on the grounds that the parties had not agreed to them because the terms were not sufficiently highlighted by the offering party.<sup>15</sup> As one court explained, browse-wrap terms will not enter the agreement if the party had visited a website only sporadically and, therefore, was unaware of the terms and conditions that were available, but not immediately presented, on the website. However, if the evidence shows that the party had notice of the terms and conditions referenced on the site, then that party will be bound by the posted terms.<sup>16</sup> The analysis in these cases focused on the

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<sup>14</sup> Two commentators recently noted that this nomenclature does not correspond to natural, fixed categories because some commercial situations will exhibit characteristics of both scenarios. See Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2005–2006*, 62 BUS. LAW. 195, 201–03 (2006) (discussing the irrelevance of the click-wrap/browse-wrap distinction as exhibited in *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147 (Tex. Ct. App. 2006)). See also Juliet Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307 (2005) (arguing that courts should assess cases in terms of the signaling function of the communication methodology to reference the terms, rather than attempting to define different categories of cases).

<sup>15</sup> The classic case is *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002). The court concluded 1) that the persons seeking to download the SmartDownload program would have no reason to scroll down the web page to find the link to the terms and conditions, 2) that the link went to a generic page with a number of different license terms for various products, and 3) that there was no “I agree” button that signaled the existence of the terms and conditions. The court concluded: “We disagree with the proposition that a reasonably prudent offeree in plaintiffs’ position would necessarily have known or learned of the existence of the SmartDownload license agreement prior to acting, so that plaintiffs may be held to have assented to that agreement with constructive notice of its terms.” *Id.* at 30. The court noted that UCITA “generally recognizes the importance of conspicuous notice and unambiguous manifestation of assent in online sales and licensing of computer information,” showing that this effort by NCCUSL may be influential despite its failure as a uniform law project. *Id.* at 34.

<sup>16</sup> *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–02 (2d Cir. 2004) (emphasizing the ordinary contract principles at work by analogizing to a roadside fruit stand with a bushel of apples and a sign that indicates they are for sale for 50 cents each). The court specifically rejected the suggestion by other courts that clicking an “I agree” button was a necessary element of showing one’s assent to the posted terms, concluding:

conspicuous character of the posted terms of use, viewed in light of the parties' contracting history, the nature of the interactions between the party to be bound, and the website in question. In general, if a commercial party with some measure of sophistication sought to avoid a reasonable term of use by claiming ignorance of the terms, despite repeated visits to the website, courts have been reluctant to permit that commercial party to avoid liability.<sup>17</sup>

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[W]e are not inclined to agree with the *Ticketmaster* court's analysis. There is a crucial difference between the circumstances of *Specht*, where we declined to enforce Netscape's specified terms against a user of its software because of inadequate evidence that the user had seen the terms when downloading the software, and those of *Ticketmaster*, where the taker of information from Ticketmaster's site knew full well the terms on which the information was offered but was not offered an icon marked, "I agree," on which to click. Under the circumstances of *Ticketmaster*, we see no reason why the enforceability of the offeror's terms should depend on whether the taker states (or clicks), "I agree."

We recognize that contract offers on the Internet often require the offeree to click on an "I agree" icon. And no doubt, in many circumstances, such a statement of agreement by the offeree is essential to the formation of a contract. But not in all circumstances. While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract. It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree. . . .

As we see it, the defendant in *Ticketmaster* and *Verio* in this case had a similar choice. Each was offered access to information subject to terms of which they were well aware. Their choice was either to accept the offer of contract, taking the information subject to the terms of the offer, or, if the terms were not acceptable, to decline to take the benefits.

*Id.* at 403 (criticizing *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000)) (citations omitted).

<sup>17</sup> See *Register.com*, 356 F.3d at 396–97 (upholding the browse-wrap agreement on the terms of use and noting that *Verio* devised an automated software program, or robot, to acquire information from *Register.com*'s site and then attempted to use that information for its own commercial benefit in a manner that "was inconsistent with the terms of the restrictive legend *Register* attached to its responses to *Verio*'s queries"); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 976 (E.D. Cal. 2001) (refusing to dismiss the complaint for breach of contract against *Gigmania*, which downloaded up-to-date information on concerts from *Pollstar*'s site and then posted this information on its own site).

In the fact-specific and uncertain legal environment surrounding browse-wrap agreements, sellers quickly adapted by introducing click-wrap formats on their websites that both made clear the terms and conditions that governed the transaction, and made these terms immediately available to the party in a scrolling text box or via hyperlink.<sup>18</sup> Pure click-wrap contracts have received very favorable treatment by the courts under standard contract analysis. Courts have readily concluded that clicking an "I agree" icon next to an electronic presentation of the seller's terms forms a contract and manifests the purchaser's assent to those terms.<sup>19</sup> Click-wrap cases are easy cases

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Even in the consumer setting courts have enforced browse-wrap agreements in circumstances where the party had more than cursory notice of the terms. *See, e.g.* *Fiser v. Dell Computer Corp.*, 165 P.3d 328, 334 (N.M. App. 2007) (holding that Fiser was bound by terms that were available not only by a hyperlink during the ordering process, but also were included with the delivery of the computer when Fiser still had the ability to cancel the transaction).

<sup>18</sup> The move to click-wrap contracting was a predictable response to the *Specht* case. For example, in the aftermath of the District Court opinion in *Specht*, attorney David Scranton suggested that his fellow banking lawyers ought to be advising their clients using website interfaces to transition immediately to click-wrap contracting to ensure enforceability.

Even if other courts decide otherwise, this decision appears clear enough that banks and other financial institutions should be promptly reevaluating their Web sites to be sure that any terms, conditions or agreements that are intended to be binding upon a visitor are implemented with a "click-through" type mechanism to verify that the visitor is aware of them and agrees to them. . . .

...

Thus, although the matter may not be finally resolved in many jurisdictions, it clearly appears to be a unanimous trend of decisions to uphold click-wrap agreements if they sufficiently give notice of an agreement's terms to a Web site visitor and require the visitor to affirmatively indicate agreement by clicking a button, but to deny enforceability to browsewrap or other agreements that require something less of a visitor.

David F. Scranton, "*Clickwrap*" or "*Browsewrap*": *Enforceable Website Agreements*, 119 *BANKING L.J.* 290, 291, 295 (2002). This advice has only been reinforced by the United States Court of Appeals for the Second Circuit's decision affirming *Specht* and other case law on these points.

<sup>19</sup> One commentator recently concluded, "[b]ecause the user has 'signed' the contract by clicking 'I agree,' every court to consider the issue has held clickwrap licenses enforceable." Mark A. Lemley, *Terms of Use*, 91 *MINN. L. REV.* 459, 466 (2006) (citing relevant cases in note 20). Representative cases include: *Specht*, 306 F.3d at 22 (finding that the parties "expressly agreed to Communicator's license terms by clicking 'Yes'"); *Forrest v. Verizon*

because there is no ambiguity regarding the time of formation, as there is in shrink-wrap cases; here, the terms are present when the buyer manifests assent. Consequently, most courts find § 2-207

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Commc'n, Inc., 805 A.2d 1007, 1010–11 (D.C. Ct. App. 2002) (consumers had notice and opportunity to read the forum selection clause before clicking "I agree"); RealPage, Inc. v. EPS, Inc., No. 4:06-CV-251, 2007 WL 2572255 (E.D. Tex., Sept. 5, 2007) (holding that click-wrap terms are enforceable even if the party was not required to scroll through the entire agreement before clicking "I accept," but finding that the terms in question were too indefinite to enforce); Doe v. Sexsearch.com, 502 F. Supp. 2d 719 (N.D. Ohio, 2007); Hauenstein v. Softwrap Ltd., No. C07-0572MJP, 2007 WL 2404624 (W.D. Wash., Aug. 17, 2007); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007) ("By clicking on the 'Yes, I agree to the above terms and conditions' button, Plaintiff indicated assent to the terms . . . Plaintiff's failure to read the Agreement, if that were the case, does not excuse him from being bound by his express agreement."); FTC v. Cleverlink Trading Ltd., No. 05 C 2889, 2006 U.S. Dist. LEXIS 82264 (N.D. Ill. Oct. 26, 2006) (finding that clicking an "Accept" box is analytically indistinguishable from traditional ways of showing assent, and that there "is no dispute that Cleverlink [buyer] applied for Oceanic's [seller] services over the Internet and accepted the terms of the Agreement by clicking the 'Accept' box"); Eslworldwide.com, Inc. v. Interland, Inc., No. 06 CV 2503(LBS), 2006 WL 1716881 (S.D.N.Y. June 21, 2006) (forum selection clause enforceable although contained in the terms of service agreement that the plaintiff allegedly inadvertently clicked when visiting the site to update its credit card information on file); Siebert v. Amateur Athletic Union of the U. S., Inc., 422 F. Supp. 2d 1033, 1039–40 (D. Minn. 2006) (finding that clicking the icon is a manifestation of assent to the terms offered); i-Systems, Inc. v. Softwares, Inc., No. Civ. 02-1951 JRTFLN, 2004 WL 742082, \*6 (D. Minn. Mar. 29, 2004) (click-through process for loading 2001 software formed a contract); Koresko v. RealNetworks, Inc., 291 F. Supp. 2d 1157, 1162–63 (E.D. Cal. 2003) (finding that clicking the "I agree" icon evidenced express agreement to the offeror's terms); DeJohn v. TV Corp. Int'l, 245 F. Supp. 2d 913, 919 (N.D. Ill. 2003) ("Although it is true that the terms of the contract were dictated solely by Register.com, DeJohn expressly indicated that he read, understood, and agreed to those terms when he clicked on the box on Register.com's website."); Hughes v. McMenamon, 204 F. Supp. 2d 178, 181 (D. Mass. 2002) (forum selection clause in click-wrap agreement is enforceable); iLan Sys., Inc. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (finding explicit acceptance of terms by clicking on "I agree"); *In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill., May 8, 2000); Forrest v. Verizon Commc'n, Inc., 805 A.2d 1007, 1010–11 (D.C. Ct. App. 2002) (finding that consumers had notice and opportunity to read the forum selection clause before clicking "I agree"); and Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 532 (N.J. App. 1999) ("Plaintiffs must be taken to have known that they were entering into a contract [by clicking "I agree"], and no good purpose, consonant with the dictates of reasonable reliability in commerce, would be served by permitting them to disavow particular provisions or the contracts as a whole.").

In this article I assume that for all practical purposes, the battle regarding assent is over—perhaps with good cause in light of Karl Llewellyn's theory of blanket assent, see text and accompanying notes 74–82 *infra*—and that the issue facing courts is how to determine the governing terms of the agreement. Nevertheless, it is worth recalling that genuine assent is anything but clear-cut in these cases.

wholly irrelevant to the legal analysis, just as if the parties had signed a single paper document memorializing their agreement.<sup>20</sup>

Although the situation is not quite as clear-cut, courts reach the same result for software that requires the licensee to click-through several "I agree" icons in order to install the program. In these situations, courts find either (1) that the agreement was not finalized until the click-wrap stage during installation (the "rolling contract" analysis), (2) that the click-wrap agreement during the installation represents the buyer's acceptance of the seller's counteroffer, or (3) that the click-wrap agreement is a modification of a pre-existing agreement that led to the shipment of the product. The rules of § 2-207 are implicated only under the counteroffer analysis, and then only to establish that the counteroffer was accepted by the licensee; therefore, there is no traditional battle of the forms.<sup>21</sup>

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<sup>20</sup> *Salco Distribs. v. Icode, Inc.*, No. 8:05-CV-642-T-27TGW, 2006 U.S. Dist. LEXIS 9483 (M.D. Fla. Feb. 21, 2006). The *Salco* Court held that by signing a purchase order that referenced an End User License and Servicing Agreement, opening the envelope containing the software that contained a similar legend and then clicking several "I accept" icons in the course of installing the software, the licensee was bound by the licensor's forum selection clause. The court followed the seemingly unanimous approach of courts that specifically reject the application of § 2-207 in such cases, concluding that § 2-207

[A]ddresses the terms of a contract "when the parties's [sic] conduct establishes a contract, but the parties have failed to adopt expressly a particular writing as the terms of their agreement, and the writings exchanged by the parties do not agree. . . ." *Step-Saver Data Sys., Inc. v. Wyse Tech.* 939 F.2d 91, 98 (3d Cir. 1991). Here, Plaintiff and Defendant expressly adopted a particular writing as their Agreement. As noted in *ProCD, Inc., [v. Zeidenberg]*, 86 F.3d 1447 (7th Cir. 1996)], this is not "a battle-of-the forms case, in which the parties exchange incompatible forms and a court must decide which prevails." *ProCD, Inc.*, 86 F.3d at 1452. . . .

...

Plaintiff expressly accepted the terms of the Agreement by opening, installing and registering the software and clicking "I accept." Its terms are therefore enforceable.

*Id.* at \*11-14; see also *Siebert*, 422 F. Supp. 2d at 1039-40; *Davidson & Assocs. v. Internet Gateway*, 334 F. Supp. 2d 1164 (E.D. Mo. 2004); *Koresko*, 291 F. Supp. 2d at 1162-63.

<sup>21</sup> *iLan Sys., Inc.*, 183 F. Supp. 2d at 338 (discussing the various ways in which the agreement could be construed, but finding that even under § 2-207 the parties ultimately agreed on additional terms by virtue of the click-wrap agreement embedded in the disks).



Finally, there may be an intermediate shift in practices that also would render the battle of the forms irrelevant. We might add to the developed lexicon by recognizing an additional category of cases that can be termed “sign-wrap” contracts. These cases present a variation on the doctrine of incorporation by reference. The sign-wrap situation occurs when parties execute a written agreement that includes a notice that the terms of the agreement include standard terms that are posted at a designated URL. Although the parties are dealing with a paper contract, the referenced “standard terms and conditions” reside only in cyberspace.<sup>22</sup> Unlike the traditional form contract that presented the standard terms and conditions on the reverse side of the document, the sign-wrap approach permits a party to obtain a signature on a form that contains the agreed material terms and a reference to a URL that purports to incorporate those standard terms into the agreement, despite the other party’s potential ignorance of their existence.

Compared to the browse-wrap scenario, there is a more specific manifestation of assent because the party signs the form that includes the URL reference. However, compared to the click-wrap scenario, there is less explicit consent to the terms in question because there is no specific assent to terms that are immediately available before signing. It would appear that the intermediate strategy of sign-wrap contracts will generate litigation and uncertainty.<sup>23</sup> Thus, it is likely that this approach will be phased out in favor of a web-based “click-wrap” approach, to the extent possible.

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<sup>22</sup> Compare *Hugger-Mugger, L.L.C. v. NetSuite, Inc.*, No. 2:04-CV-592 TC, 2005 U.S. Dist. LEXIS 33003, at \*15 (D. Utah Sept. 12, 2005) (finding that the terms were incorporated by reference), with *Affinity Internet, Inc. v. Consol. Credit Counseling Servs.*, 920 So. 2d 1286, 1288 (Fla. Dist. Ct. App. 2006) (finding that the mere reference to the website was insufficient to incorporate the terms). These cases are analyzed in Moringiello & Reynolds, *supra* note 14, at 199–200. But cf. *Conference Am., Inc. v. Conexant Sys., Inc.*, 508 F. Supp. 2d 1005 (M.D. Ala. 2007) (finding that a letter referencing terms at a URL successfully incorporated the posted terms under unilateral contract analysis).

<sup>23</sup> One significant problem might arise in determining the terms that were posted at the URL at the time of contracting. Assuming that the party continually adjusts its terms, it would stretch even a formalist approach to contract doctrine to conclude that the other party had consented to permit the terms of the agreement to be modified at will simply by changing the terms posted at the designated URL. If a party expressly attempts to subject the other party to terms that may be changed at will, it seems difficult to understand how the test of an “intent to be bound” would be met. Even if the contract is interpreted in this manner, there would be a significant question of the bounds of a good faith exercise of this right that would render the terms less predictable. A simple solution for sellers is to change the URL with each iteration, perhaps by adding a code for the date of the update to the link, but this would lead to a multitude of different contract forms that would undermine the purpose of having a standard form agreement in the first place.

The case law struggling with the contract analysis of shrink-wrap, browse-wrap, sign-wrap and click-wrap agreements, has developed largely as a result of litigation involving computer information transactions. Although computer information transactions are not expressly included within the scope of Article 2, courts often apply Article 2 by analogy or by reading the scope provision broadly.<sup>24</sup> It

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<sup>24</sup> This is a huge and contentious issue. Article 2 applies to “transactions in goods,” U.C.C. § 2-102 (2000), with goods being defined as “all things . . . movable at the time of identification to the contract for sale.” U.C.C. § 2-105(1) (2000). Computer information is licensed rather than sold, and it is more in the nature of intellectual property than a good. A license can be considered a “transaction,” but it remains difficult to consider the licensing of intellectual property to be a “good.” Moreover, the definition of “contract” and “agreement” provide that they are “limited to those relating to the present or future sale of goods.” *Id.* § 2-106(1), and most of the provisions in Article 2 refer expressly to buyers and sellers. Nevertheless, many courts find that Article 2 provides appropriate rules governing contract formation for these transactions. The court in *iLan* characterizes this approach in an honest manner:

In Massachusetts and across most of the nation, software licenses exist in a legislative void. Legal scholars, among them the Uniform Commissioners on State Laws, have tried to fill that void, but their efforts have not kept pace with the world of business. . . . So far only Maryland and Virginia have adopted UCITA; Massachusetts has not. Accordingly, the Court will not spend its time considering UCITA. At the same time, the Court will not overlook Article 2 simply because its provisions are imperfect in today's world. Software licenses are entered into every day, and business persons reasonably expect that some law will govern them. For the time being, Article 2's familiar provisions—which are the inspiration for UCITA—better fulfill those expectations than would the common law. Article 2 technically does not, and certainly will not in the future, govern software licenses, but for the time being the Court will assume it does.

*iLan*, 183 F. Supp. 2d at 332 (footnote omitted). There is a confusing array of cases on this topic, including a recent case in which the court concluded that an agreement to develop software from scratch is not within the scope of Article 2 because it is more in the nature of a service contract, ignoring the fact that agreements to develop custom-designed and specially manufactured goods are contracts within the scope of Article 2 pursuant to the definition of “goods” in U.C.C. § 2-105(1) (2000). See *Syss. Am., Inc. v. Rockwell Software, Inc.*, No. C 03-02232 JF (RS), 2007 WL 218242, at \*4 (N.D. Cal. Jan. 26, 2007) (unpublished slip opinion).

Courts rarely note the truly Llewellynesque character of Article 2's scope provisions, which are qualified with the caveat, “unless the context otherwise requires.” See U.C.C. §§ 2-102, and 2-106(1) (2000). Consequently, Article 2 literally extends to all transactions to which it makes sense to apply Article 2, thereby granting to courts the express statutory justification for picking and choosing when Article 2 makes sense for a particular case involving computer information. This is a bit radical, I suspect, for virtually any court to embrace, but there you have it in black and white.

stands to reason that this developing line of precedent from the computer information arena will be applied to transactions in traditional goods as producers and purchasers embrace the Internet era of electronic contracting.<sup>25</sup> If so, commercial parties will have every reason to respond to this evolving legal landscape by using click-wrap agreements to secure all of their desired terms in contracts involving the sale of goods.

The problem with this development in contracting practices is that there is every reason to believe that a formalist endorsement of click-wrap agreements will not capture the parties' "bargain in fact" in some cases. Writing about consumer transactions, scholars have argued that transactions conducted over the Internet are qualitatively different in certain respects from the use of paper standardized

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A recent scholarly exchange between Professors Nimmer and Braucher about whether Article 2 should govern information transactions suggests that the radioactive fallout from the failed UCITA and Article 2 drafting projects has a durable half-life and that this issue will continue to foster a vigorous scholarly debate. Compare Raymond T. Nimmer, *An Essay on Article 2's Irrelevance to Licensing Agreements*, 40 LOYOLA L.A. L. REV. 235 (2006), with Jean Braucher, *Contracting Out of Article 2 Using a "License" Label: A Strategy that Should Not Work for Software Products*, 40 LOYOLA L.A. L. REV. 261 (2006).

<sup>25</sup> My general approach to this problem is suggested in a recent article regarding the details of computer information contracting. See Lemley, *supra* note 7 (analyzing the use of click-wrap and browse-wrap licensing of computer information on websites). I agree with Lemley that the most significant implication of this development may be the effect on commercial parties that are unable to invoke various consumer protections statutes, regulations and judicial decisions, *id.* at 462, and that we need something akin to the "battle of the forms" solution to the rise of form paper contracts in the previous century. *Id.* at 464. Lemley's primary concern rests with the increasing enforceability of browse-wrap terms against commercial parties that regularly and repeatedly visit websites to obtain computer information, particularly through the use of robots. *Id.* at 478 (arguing that enforcing browse-wrap contract between commercial parties by assuming that repeated visits to a site constitutes knowledge of the offered terms "may prove unworkable"). Professor Lemley concludes that we need a substitute for § 2-207 in the browse-wrap cases involving the use of web applications and the licensing of computer information, suggesting that perhaps courts ought not enforce terms of use that materially change the deal. *Id.* at 482. I am arguing for a more general re-orientation of the law to deal with click-wrap commercial transactions that might result in unfair surprise or hardship to a party that finds itself bound to all of the other party's terms in the course of contracting for the purchase or sale of goods.

Michael Madison provides an insightful assessment of the enforceability of terms of use according to the property metaphor of "rights of access" and the contract metaphor of "agreement" in a manner that helps to illuminate some of the general issues that also pertain to the question of the enforceability of contract terms. See Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433 (2003).

forms.<sup>26</sup> There is no reason to draw a sharp distinction between

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<sup>26</sup> Daniel D. Barnhizer, *Propertization, Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69 (2006):

Contract scholars have been more or less obsessed with the non-dickered, adhesive nature of standardized form contracts for much of the last century. The modern reality of highly sophisticated forms of adhesion contract—browse-wrap and click-wrap contracts—appears to exacerbate the lack of assent and take-it-or-leave-it nature of consumer adhesion contracts.

*Id.* at 71.

The Internet-based consumer contract appears to stretch the volitional nature of contract past the breaking point through the use of browse-wrap and click-wrap terms, and to deprive e-consumers of all bargaining power, except the naked ability to walk away from the deal. As Professor Radin has observed, consumer assent to Internet-based adhesion contracts is even more fictional than with the traditional paper versions. And, as marketing models grow more sophisticated and intrusive [including data mining to manipulate consumer choices], they threaten even that tenuous grasp on control. *Id.* at 81 (citing Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1155–60 (2000)). See also, Moringiello, *supra* note 14, at 1309–10, 1319 (arguing that courts should not apply contract formation rules from the world of paper contracts without assessing the differences in the signaling function of electronic modes of contracting, including the fact that in the electronic environment (at least in its early stages) many consumers may not even understand that there are detailed boilerplate terms to which they are agreeing).

Jay Feinman has argued that this solicitude for form agreements presented electronically is part of a broader “unmaking” of modern contract law and a return to classical approaches to formation. Jay M. Feinman, *Un-making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 19–20 (2004). Charles Knapp recently expressed his concerns about the revival of a formalistic approach to electronic contracting in a brief footnote response to Randy Barnett’s thesis that clicking “I agree” manifests one’s consent to be bound:

But typically the signing of a written agreement, even if accompanied by a series of “initialings” as well, is a one-time action, with substantial “cautionary” as well as “channeling” aspects. (Recall the well-worn phrase: “Sign on the dotted line.”) . . . In contrast, on-line transactions typically involve a whole series of clickings and typings to get from start to finish; whether any particular one of those has the kind of symbolic significance equal to the signing of one’s name on a document seems to me to be extremely dubious.

Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOYOLA L.A. L. REV. 95, 113 n.71 (2006) (criticizing Randy Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 635 (2002)).

Professors Hillman and Rachlinski reach the apparently different conclusion that existing contract law is “up to the challenge” of the electronic age “because the basic structure and underlying economics of the standard-form transaction are consistent in both the paper and electronic worlds.” Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 434, 495 (2002). However, they also endorse Llewellyn’s notion of “blanket assent” that is policed by courts on a case-by-case basis, concluding that “courts must continue to be concerned that consumers unwittingly will enter into standard-form agreements that are primarily exploitative rather than mutually beneficial.” *Id.* at 485. Thus, they appear to reject an overly formalist approach to assent in electronic forms.

This discussion often is held in the shadow of economic theorizing about efficient markets and the costs of paternalistic interventions, but more recent behavioral research explains how adhesion contracts in the consumer setting can be inefficient and oppressive despite the claims of law and economics scholars. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217 (2003) (arguing that research establishes that “the fundamental cause of inefficient terms in form contracts lies in the boundedly rational approaches buyers use to evaluate information and make choices in the marketplace,” and suggesting that the doctrine of unconscionability be revised and applied in light of this source of inefficiency); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240–48 (1995) (contract doctrines relating to standard form agreements are best understood as a response to bounded rationality rather than an effort to police the exploitation of one party by another). Robert Prentice has argued in detail that the “Chicago Man” of law and economics, assumed to be unboundedly rational, has been shown by extensive research to be implausible; thus, he has been replaced by “K-T Man” of behavioral economics, assumed to be subject to heuristics and cognitive biases. Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663 (2003) (critiquing Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002), and Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67 (2002)). Prentice provides a powerful argument in favor of a cautious and pragmatic adoption of the lessons of behavioral decision theory.

Policy prescriptions based on complicated but very real facts have more promise than those based on elegant but very wrong theory. . . . The policy prescriptions offered by legal decision theorists will never be incontestable. They will seldom be simple. However, for K-T Man to have more descriptive, explanatory, predictive, and prescriptive power than Chicago Man, people need only be systematically (not universally and uniformly) subject to the various heuristics and biases discussed in the literature. And they are. . . .

Despite the limitations of social science research . . . the debate over whether the economists’ Chicago Man or the psychologists’ K-T Man better describes reality is over; the psychologists won.

Prentice, *supra* note 24, at 1771, 1774.

consumers and commercial parties in this respect. As Jean Braucher notes, protective legislation and common-law doctrines “are explicitly or in practice restricted to consumer contracts, . . . [b]ut line-drawing is commonly highly underinclusive and perhaps occasionally overinclusive.”<sup>27</sup> Although Braucher argues against creating a new “small business” category for analysis, she does suggest that courts consider the context of the transaction more carefully.<sup>28</sup> Larry Garvin has detailed how the sharp consumer-commercial distinction in contract law fails to match reality,<sup>29</sup> but he too urges that we not compound the error by simply creating an intermediate category of

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It would be a mistake to adopt specific legal rules based on a supposed truth about how parties deviate from rational behavior, but it seems plain enough that we have confirmed experimentally what people have known intuitively since the emergence of literature, religion and philosophy: people never act in a wholly rational manner that can provide a steady backdrop for the adoption of specific legal rules.

<sup>27</sup> Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Standard Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 396–97 (2003).

<sup>28</sup> Braucher reasons:

A business may be small but make a large, negotiated contract in which all terms are carefully considered after investigation of available alternatives. On the other hand, a large business may make a relatively small transaction in which it would not make economic sense to negotiate or even shop over terms, especially complex ones.

*Id.* at 397.

<sup>29</sup> Garvin argues that small businesses are regularly placed on the “commercial” side of contract law’s bifurcated system of rules, although in many situations they more closely resemble consumers.

“In many ways, small business most resemble consumers and non-merchants in their abilities to deal with risk, whether financially or cognitively, to secure and process information, and to fend for themselves in the market. Nevertheless, they are generally—almost invariably—treated like merchants. Small businesses thus get the worst of each dichotomy. In their dealings with consumers, small businesses must give protections based on asymmetries that may not exist. In their dealings with larger businesses, small businesses are treated as though the parties are essentially equal, which will not usually be true save in the most formal sense.”

Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 297 (2005).

“small business.”<sup>30</sup> At this juncture, it is sufficient to note that the loss of the force-field protections of §2-207 by commercial parties might lead to unacceptable results on the fringes for business entities that find themselves subject to surprising and unreasonable click-wrap terms, but in response to which they are unable to utilize consumer protection statutes and case law.

### C. STRATEGIES FOR RECLAIMING THE FORCE-FIELD PROTECTION OF § 2-207

Article 2 effectively solved the problem of standard form contracts by permitting commercial parties to wage battles with their forms and thereby achieve the “force-field” protection of § 2-207. In contrast, consumers do not use forms in contracting. Consequently, a large body of consumer-oriented law developed in statutory, regulatory, and common law forms to ensure the integrity of consumer contracting. However, commercial parties that no longer exchange forms in the course of contracting may find themselves in a strange new world in which they no longer have “force-field” protection, nor are they able to avail themselves of consumer protection law. The question then becomes whether a commercial party might recover the benefits of § 2-207 in this new, post-battle of the forms contracting environment.

Commercial parties might regain the benefits of § 2-207 in several ways. First, a party confronted with a sign-wrap form could, relatively easily, include a handwritten notation at the time that it signs the document stating that its “assent is withheld unless the seller assents to the terms and conditions located at <http://www.goodspurchaser.com/terms.html>.” This strategy would simply transfer the battle of the forms to the battle of the URLs within a single form; in these circumstances, courts might preserve the force-field protection of § 2-207 for the parties. Of course, if the seller responded to such a strategy by insisting that the offending addition be stricken and that the other party agree to all of its terms and conditions, this would

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<sup>30</sup> The vast diversity in small businesses creates a “messy” reality, “and suggests that a one-size-fits-all approach to treating small business in contract and commercial law will fail.” *Id.* at 370. Recent research suggests that the simplifying nomothetic assumption that all consumers share the same cognitive deficits is misleading. Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207 (2006). This does not undermine the claim that behavioral decision theory is an improvement over the assumed rational actor of economic theory, even if it cannot paint a complete picture of all human action, see Prentice, *supra* note 26, at 1765–67, but it does counsel against repeating the same mistake of theoretical over-generalizing that afflicted the approach of law and economics.

elevate the transaction to an express agreement as to the terms. Except in rare cases involving extreme overreaching, commercial law would properly enforce such an agreement reached by express manifestation of an intention to incorporate only one party's terms. The point, of course, is that § 2-207 is premised on the assumption that most commercial parties do not have the time or the inclination to negotiate an agreement to this level of detail, nor will either party want to sacrifice the deal by insisting that the other party agree to all of its terms. Many commercial parties are likely to proceed with the transaction despite the "battling" notation on the signature line, as long as they both believe that they have successfully powered-up the force-field protections of § 2-207.

As indicated above, though, parties will move aggressively to adopt click-wrap contracting to achieve the advantages of computerization and to ensure that their terms are incorporated in the contract. Faced with a click-wrap offer, a commercial party might pursue several strategies to overcome the developing click-wrap dogma that the offering party's terms will exclusively govern the transaction. Perhaps the most direct response would be to use actual express assent to establish the terms of the contract. For parties that anticipate an ongoing relationship, it might be cost-effective for them to negotiate detailed terms that could be embodied in a master agreement that establishes important terms such as those governing default or the means for resolving disputes. This strategy would counter the purported agreement of the click-wrap format with a genuinely express (dickered) agreement between the parties.

Nevertheless, there are likely to be several problems with addressing the click-wrap scenario in this direct manner. One of the primary functions of the battle of the forms was that it empowered the parties to raise the contracting force-field of § 2-207 to protect themselves without having to negotiate all of the pertinent terms of the agreement. In contrast, the "master agreement" strategy imposes significant additional costs on the parties and is unlikely to be widely utilized in everyday transactions. More important, the master agreement will not be able to thwart terms incorporated by later click-wrap ordering, because § 2-209 ensures that modifications are enforceable without additional consideration. Even the most carefully negotiated master agreement can be negated by the terms that the buyer might be deemed to have later expressly accepted by clicking "I agree," to the extent that these later terms are effective modifications of the master agreement under the liberal provisions of § 2-209(1), (2) and (3), or constitute a waiver of rights under § 2-209(4) and (5). Even if the master agreement contains a "no oral modification" clause, contemporary commercial law regards an electronic assent to a click-



wrap agreement as creating a record sufficient to support the modification of the master agreement. The parties might provide in the master agreement that all modifications must be in written form, rather than electronic form, but this would jeopardize subsequent minor modifications that might be concluded by an exchange of e-mails and thereby disrupt reasonable commercial expectations.<sup>31</sup>

The difficulties that arise in preventing later modifications would best be handled by the general obligation of the parties to deal with each other in good faith.<sup>32</sup> Because modifications are construed as a continuation of the original agreement that would require additional consideration, rather than as a new agreement, all modifications trigger the parties' general obligation to act in good faith when performing or enforcing their rights under the contract.<sup>33</sup> Courts might be tempted to characterize the seller's actions as being in bad faith (both as dishonesty in fact and also as actions that do not conform to reasonable commercial standards of fair dealing) if the seller countermands the terms of the master agreement through click-wrap contracting rather than by obtaining actual assent to the change in terms. This seemingly sensible characterization raises a quandary for the courts, though, because it forces them to acknowledge the lack of genuine assent that is part of most click-wrap contracting. Some courts might find that the strong validation of click-wrap agreements in legal precedents ties their hands, while others might distinguish the situation in light of the reasonable expectations engendered by the master agreement. To summarize, parties are likely to hesitate to use master agreements because the added time and cost might not be successful in withstanding a click-wrap modification.<sup>34</sup>

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<sup>31</sup> The principle of freedom of contract is recognized both in the UNIF. ELEC. TRANSACTIONS ACT § 5 (2000) and the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001(b)(2) (2000), effectively permitting parties to agree not to accept electronic records for contracting purposes. The traditional "battle of the forms" would also provide force-field protections to the parties at the secondary level of modification. If two parties reached a master agreement, and then one party enclosed a standard form invoice with the goods, it would be ineffective unless accepted by the recipient. In the event that parties to a master agreement exchanged forms with respect to a particular shipment, the force-field protections of U.C.C. § 2-207 would guide the determination of the terms if the non-mirroring forms created an agreement to modify under U.C.C. §§ 2-207 (1) and 2-209.

<sup>32</sup> U.C.C. § 2-209, cmt. 2 (2000).

<sup>33</sup> *Id.*, § 1-304 provides that every performance and enforcement of a contractual duty must be undertaken in good faith.

<sup>34</sup> Because most ongoing contractual relationships governed by a master agreement are relational in nature, it would be unlikely that the seller would seek to gain and enforce an

The most difficult scenario involves a pure click-wrap transaction, in which the only documentation of the transaction occurs when the buyer enters data on the seller's website and then clicks "I agree." The buyer can invoke § 2-207 only by countering with its own form, but in an Internet setting this can be difficult. A buyer could click "I agree," and then type "assent is withheld unless seller agrees to the terms and conditions located at <http://www.goodspurchaser.com/terms.html>" in a space provided for comments or additional details. This action would transform the transaction into a typical "battle of the forms" scenario, which would give effect to both parties' force-field under § 2-207.

However, there may be a number of difficulties with this attempt to invoke § 2-207 in the click-wrap context. First, there may be an issue regarding the effectiveness of the notation on the click-wrap site if the party's business is completely automated. Although the Uniform Computer Information Transaction Act ("UCITA") has failed and no longer is supported by the Uniform Law Commission ("ULC"), in some respects it might represent something akin to a Restatement and, therefore, be influential in how courts address these issues. UCITA § 206(c) provides that the terms of a contract concluded between an electronic agent and a person does not "include a term provided by the individual if the individual had reason to know that the electronic agent could not react to the term."<sup>35</sup> In short, when

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advantage over the buyer through click-wrap modifications. But despite the fact that many commercial dealings are relational, the courthouses never seem to want for business. The scenario that I describe in the text is most likely to occur if there is a serious problem with the business relationship caused by economic distress or party animosity that leads both parties to direct their lawyers to fight for the upper hand. At this point, the standard terms and conditions associated with the "I agree" button will be mined for their value, and the other party is likely to be surprised that it may have continually overridden the master agreement through the years with click-wrap modifications.

<sup>35</sup> An "electronic agent" is defined as "a computer program, or electronic or other automated means, used independently to initiate an action, or to respond to electronic messages or performances, on the person's behalf without review or action by an individual at the time of the action or response to the message or performance." UNIF. COMPUTER INFO. TRANSACTION ACT § 102(a)(27) (1999).

Amended Article 2 embodies this same principle regarding contract formation in an electronic environment. U.C.C. § 2-204(4)(b) (2003) ("A contract is formed if the individual takes actions that the individual is free to refuse to take or makes a statement, and the individual has reason to know that the actions or statements will: . . . (ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react."). As explained in comment 5, this "subsection validates an anonymous click-through transaction," but leaves the determination of the terms to § 2-207. *Id.*

dealing with an automated website, a party is unlikely to prevail on the basis of its attempt to inject terms into the transaction. A more practical problem arises if the website simply does not provide any space to make such a notation; this scenario leaves the other party no option other than to abort the transaction, or, complete it and then send its form by traditional means after placing the order. Adopting a “battling form sent later” approach will, undoubtedly, be ineffective because the click-wrap agreement would constitute a final agreement, with the later documentation being viewed as a proposal for modification that must be expressly accepted by the party in order to be effective against it.

Therefore, as parties adopt a click-wrap approach to contracting, it will be difficult to maintain the advantages that § 2-207 has brought to commercial contracting, unless the parties find that it is economical to conclude a master agreement that is drafted in a manner that attempts to make inadvertent modifications through future click-wrap transactions ineffective. Consequently, courts will likely need to find a doctrinal substitute for the increasingly moribund § 2-207.

### III. AFTER THE BATTLE OF THE FORMS

Commercial parties generally are left to their own fate when they have agreed to contract terms through an express manifestation of their assent, inasmuch as most protective legislation and case law is oriented toward consumers who are viewed as unskilled and unpracticed in the ways of contracting and commerce. Consequently, a commercial party that finds itself subject to click-wrap agreements that include unforeseen and undesirable terms will not have many available strategies for avoiding them. Many commentators will argue that the reputational constraints of the market will provide a sufficient check on overreaching, but this response misses the crux of the problem.<sup>36</sup> A party seeking the efficiencies of web-based transactions is likely to employ a legal team that will draft terms and conditions designed to provide every bit of leverage possible for the extreme cases or situations, knowing that the party is likely to proceed, in most cases, on the basis of sound business practice rather than with the goal

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<sup>36</sup> See, e.g., Hillman & Rachlinski, *supra* note 26, at 443–45 (arguing that market constraints are real but imperfect, and suggesting the need for judicial intervention); Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 976–80 (2005) (describing market constraints on exploitive seller behavior but acknowledging that they may be “insufficient to constrain sellers’ tendencies to exploit buyers” and might call for regulatory intervention).

of exacting every benefit available under the strict terms of the agreement.<sup>37</sup> Questions arise in the fringe cases, when parties cease

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<sup>37</sup> Stewart Macaulay summarized this commercial reality in his commentary on the significance of Ian Macneil's relational theory of contract.

Some firms attempt to arm themselves with end-game strategies by placing "heads I win, tails you lose" clauses in form contracts unlikely to be read until trouble arises. . . . Firms hide loopholes in the fine print, knowing that these terms will not be the subject of negotiations. These terms are used to ward off legal liability by providing bright-line rules. Rather than having to prove such things as fraud, material failure of performance, or substantial breach, the firm's lawyers give themselves an easy-to-establish standard.

Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bermstien*, 94 NW. U. L. REV. 775, 796 (2000).

The factors leading some parties to "load up" the terms and conditions are straightforward:

Furthermore, as some commentators have argued, businesses themselves might be ignorant of the terms offered in their boilerplate agreements. Businesses often delegate the job of drafting their terms to lawyers, who believe that they can best serve their clients by composing an arsenal of one-sided terms without regard to the business environment, or for that matter, anything else. In addition, business managers might rely on some of the same cognitive processes that affect consumers. In particular businesses might worry too much about protecting themselves from rare events, overestimating the likelihood of such events because of a few salient incidents.

Hillman & Rachlinski, *supra* note 26, at 444.

There may be industries, indeed many industries, in which competitive pressures lead parties to draft even-handed terms, but it would be foolish to assume that this holds true throughout the commercial world. The problem arises when one of the parties suddenly ignores the "bargain in fact of the parties" and insists upon compliance with form documents long-since filed and largely ignored during the course of the relationship. As Macaulay observes:

[The] legal staff may write a detailed contract that is not understood by the executive representing the corporation in negotiations. This is likely to be the case when it is a complex printed standard-form agreement. The executive negotiating the contract will know that the people on the other side will not read and understand the document. Moreover, the executive may know that the other side is unlikely to have the document reviewed by a lawyer. Then all business is transacted in ways inconsistent with the lawyer's contract, which has been buried in the files. If a court allows such a written contract to wipe out a history of interaction, then its decision may be based on expectations and reliance only in a fictional sense.

operating on the basis of business goals and relationships, and seek to maximize their legally enforceable rights. Moreover, reputational constraints are not a unitary check on a particular party's behavior. Customer relations imperatives may shape the treatment of most customers most of the time, but not all customers all of the time.<sup>38</sup>

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Macaulay, *supra* note 37, at 795. The punch line, though, comes with Macaulay's observation that when the end-game arrives and the lawyers run for the form documents, "Section 2-207 of the Code attempts to sort out the mess." *Id.* at 798. With the "battle of the forms" era drawing to a close, we may be left with only a formalist mess.

<sup>38</sup> A commercial party might believe that putting extreme one-sided terms in its forms is justified because it will invoke these terms only when faced with a "bad buyer." Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WISC. L. REV. 679, 703-13 (2004). Of course, this discretion provides latitude for the party to exercise these rights in ways that are not benign. *Id.* at 707-08. Additionally, this argument ignores the fact that parties seeking to enforce their standard terms will be as subject to the limits of cognition caused by heuristics and biases as the other party when considering the standard terms. Ichiro Kobayashi makes a similar point in connection with consumer transactions in greater detail:

Suppose that a seller repeatedly sells machines to buyers and the seller regularly accepts refunds out of concern for his reputation. The seller does not desire to include in a contract a clause that the seller accepts any refund because the clause may not give the buyer incentives to use the machine in an appropriate manner. Contracting parties do not explicitly write the seller's refund policy in their contract. Put another way, parties intentionally write stricter contract terms, and the fair distribution of costs and benefits is delegated to a flexible application of informal norms. Transactional substance is expelled out of the formal legal regime, and contracting parties create non-legal norms to reflect any substance.

Ichiro Kobayashi, *Private Contracting and Business Models of Electronic Commerce*, 13 U. MIAMI BUS. L. REV. 161, 172 (2005).

Kobayashi suggests that the normative implication of this new business reality is that consumers might legitimately be bound to unread electronic terms as the cost of obtaining the firm's business model. *Id.* at 183-84. Courts should intervene on behalf of consumers only when the written terms exploit consumers in a manner that is outside the scope of the business model's protective features (citing the *Specht* case as an example), but not with respect to a dispute that is within the scope of the incentive mechanisms established by the business model (citing the *ProCD* case). *Id.* at 184-85.

Kobayashi's approach to consumer contracting is consistent with my focus on the need for courts to ensure that agreements are enforced to protect the "reasonable expectations" of commercial parties, although he frames his argument in the language of efficiency:

To summarize, because electronic commerce is more automated and standardized than paper-based transactions, contract term interpretation must be made by considering the overall business model

This is not so much to say that the legal clauses are unimportant, as to recognize that the legal regime is relatively unimportant for much of everyday commercial life.<sup>39</sup> However, the enforceable terms of the

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and its embedded incentive mechanisms that support informal self-enforcement. . . . It allocates formal and informal regimes so well that relatively formalistic interpretation of contract terms (whether those terms are browswrapped or clickwrapped in a website screen) are generally justified as an interpretation principle. This does not mean that courts should not consider consumer exploitation, market Internet fraud, or other failure of efficient allocation of costs and benefits arising from the novelty of electronic commerce. Although courts are unlikely to emphasize an aspect of contract formation procedure, where accessibility to those online terms and adequate notice are especially questioned, such requirements of accessibility and adequate notice do not necessarily give equitable solutions to each dispute. . . . This article therefore suggests that when such issues concerning consumer protection are argued, courts must at least be sensitive to overall efficiency underlying the merchant's business model in interpreting contract terms.

*Id.* at 185–86.

This theoretical defense of one-sided terms, even when tempered by Kobayashi's recognition of the need for judicial protection in certain respects, does not appear to be relevant to the sphere of commercial transactions. A recent article suggests that one-sided contracts may prove efficient in circumstances where the offering party (generally, a commercial seller) is bound by reputational constraints, but the accepting party (generally, a sporadic buyer in a competitive market) is not, since the one-sided terms permit the seller to police overreaching by buyers. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006). The authors correctly note that this rationale loses much of its force when applied to commercial transactions, since commercial buyers presumably are equally motivated by reputational constraints as are sellers. *Id.* at 835. Thus, even Kobayashi's recognition of the limits of the theory when applied to consumer transactions provides an insufficient corrective because the theoretical presuppositions no longer hold when the transaction is a commercial transaction.

<sup>39</sup> A recent article suggests that business models of electronic commerce have developed to ensure performance and, thereby, avoid the costs of legal action, especially given the lack of reputational constraints in a highly dynamic global marketplace with relatively easy entry. Kobayashi, *supra* note 38, at 170. Kobayashi details how "operators of electronic commerce invented various bonding mechanisms, such as credit card chargeback systems, online payment mechanisms, electronic money, escrow services, and online feedback systems" to counterbalance reputational deficits. *Id.* at 171.

The Internet may very well develop in ways that empower parties subject to standard-form click-wrap agreements, which suggests that courts should regard these developments as an important part of the commercial context when assessing the validity of agreements. This would shift the debate from unpersuasive arguments about the effect of marginal consumers protecting all consumers by means of their *ex ante* review of terms, to a more plausible claim that *ex post* analysis of contract terms offered by commercial parties in

contract will have very real effects on the parties' behavior in the event of severe financial distress, traumatic market realignment, or animosity between the contracting parties that drives the parties to call in the litigators and unleash their fury.<sup>40</sup> The important question remains: if the parties have entered a click-wrap agreement, does the law place any limits on the exercise of contract prerogative even if imposing these limits is necessary only in exceptional cases?

In cases that involve truly egregious oppression, the courts might use the doctrine of unconscionability to free a commercial party from such terms, but courts have set a high bar for commercial parties to prevail on an unconscionability analysis. At present, courts are unlikely to extend the safety-valve function of unconscionability from the consumer context to general commercial parties, except in the most egregious cases that most closely resemble an oppressive consumer transaction.

An alternative strategy would be to argue that standard form adhesion contracts that are formed by click-wrap technology should be enforced according to the reasonable expectations of the parties, rather than according to a literalist and context-free reading of the boilerplate language. This legal strategy would confront the issues raised when commercial parties lose the force-field protection of § 2-207 in the emerging electronic contracting environment, but may be even less likely to succeed than an expansion of the unconscionability safety-valve. What is at stake in the reasonable expectations challenge to click-wrap agreements is no less than the

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competitive markets can be communicated effectively to prospective consumers in a variety of ways. See Shmuel I. Becher & Tal Z. Zarsky, E-Contract Doctrine 2.0: A Fresh Approach to Online Standard Form Contracts in the Age of Online User Participation (Draft 2007), 57, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=984765#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984765#PaperDownload) (developing policy prescriptions for regulatory intervention based on the degree to which there is an abundant "ex post-ex ante information flow" that can "deter firms the vendor from including imbalanced provisions" in their standard form contracts). See also Raymond T. Nimmer, 2 Info. Law § 12:47 (2004) ("The online environment, however, often offers wider alternatives and greater sources of information that, even in consumer transactions often renders [the doctrines of unconscionability and reasonable expectations] inapplicable. . . . Indeed, the online environment, which is less pressured and can permit closer review of terms by a potential user would seem to weigh more often in favor of more strongly enforcing those agreements."). Of course, this assumption is subject to empirical challenge by those who question the ability of parties to optimize their behavior by considering all available information. See sources cited *supra* note 26.

<sup>40</sup> This is best characterized as "going into Warren Zevon mode." See WARREN ZEVON, LAWYERS, GUNS AND MONEY, EXCITABLE BOY (Elektra Records 1978) ("Send lawyers, guns and money/The shit has hit the fan.").

“soul of contract law,”<sup>41</sup> and it is quite possible that the devil may already have sealed this deal.

To provide a focus for the following discussion, it will be helpful to think about a hypothetical case that permits consideration of the issues in concrete terms. Consider the case of an attorney who resigns from her firm to purchase an indoor tennis facility in her town. She will manage not only the tennis and fitness memberships, but also a pro shop that sells a variety of merchandise manufactured by national corporations. As she begins “ordering” from the manufacturers over the Internet, she constantly clicks “I agree” after entering the relevant data, assuming that the boilerplate terms are unexceptional, and in any event are nonnegotiable. Moreover, she uses sophisticated software to manage her membership, schedule courts, and maintain financial records, and this software package proclaims that it is subject to End-User License Agreements (“EULAs”). This is not only a commercial transaction, but also one that is entered into by a sophisticated individual.

Is it automatically the case that every term included as part of the click-wrap agreement should be binding, regardless of the nature of the term or the relevant circumstances? Would she be bound to permit the software vendor to access her computer, to refrain from customizing the software for her needs, and even to refrain from publicly criticizing the software? Would she have to arbitrate disputes in a distant venue? Would she be subject to restrictions on how she promoted and sold the name-brand merchandise to her customers? Would her ability to return merchandise be subject to specific and time-sensitive restrictions?

To make this hypothetical scenario realistic, one should assume that the seller is experiencing some form of financial distress, or that the market is experiencing similar disruption, leading the seller to seek to exact the full benefit of the terms drafted by its legal staff.

#### A. UNCONSCIONABILITY ANALYSIS

The first line of defense, although unlikely to succeed in many cases, is to argue that one or more terms of the click-wrap agreement are unenforceable because they are unconscionable. Common wisdom holds that commercial parties are rarely afforded relief under § 2-302, and the cases cited by the treatise writers bear out this

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<sup>41</sup> Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 23, 57 (1998).



wisdom.<sup>42</sup> Courts regularly make statements to this effect as if it were a principle of the doctrine itself.<sup>43</sup> The commercial cases in which courts have invoked the unconscionability doctrine to police the agreement invariably involve parties who are unschooled farmers, poorly educated small business owners, and other “quasi-consumers” acting in a commercial capacity.<sup>44</sup> Judge Posner manifested this

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<sup>42</sup> See JAMES J. WHITE & ROBERT S. SUMMERS, U.C.C. § 4-9, at 237 (4th ed. 1995) (citing cases for the proposition that “courts have not generally been solicitous of business persons in the name of unconscionability”); 1 WILLIAM D. HAWKLAND, UNIF. COMMERCIAL CODE SERIES § 2-302:6 (regarding the applicability of the doctrine to commercial transactions). Hawkland summarizes:

One remarkable pattern has emerged from the hundred cases or so that have been decided to date under Section 2-302, and this is that the doctrine of unconscionability is not a major force in transactions between business entities. Stated conversely, the doctrine has been used almost exclusively in consumer transactions. The reasons for this phenomenon are plain. For the most part, unconscionability has to do with taking advantage of ignorant people by imposing surprise results or harsh and oppressive terms on them. Often this happens because the consumer has no “meaningful choice.” That is to say, a gross inequality in bargaining power between the consumer, on the one hand, and a merchant, on the other, plus the fact that the consumer lacks the experience, training, skill, and help to identify alternative courses of action, may leave him in a “take-it-or-leave-it” position subject to deceitful or oppressive actions or both on the part of the other party. Businessmen, on the other hand, usually have alternatives available, and have the skill, training, experience, and help to take care of themselves in business deals. Accordingly, the courts have been willing to distinguish commercial from consumer transactions in invoking the doctrine of unconscionability. In *Keystone Aeronautics v. R.J. Enstrom*[, 499 F.2d 146 (3d Cir. 1974)], for example, the court stated: ‘A social policy aimed at protecting the average consumer by prohibiting blanket immunization of the manufacturer or seller through the use of standardized disclaimers engenders little resistance. But when the setting is changed and the buyer and seller are both business entities, ... the social policy loses its *raison d’être*.’

<sup>43</sup> See *TIBCO Software, v. Gordon Food Serv.*, No. 1:03-CV-25, 2003 WL 21683850 (W.D. Mich. July 3, 2003) (Unconscionability “is rarely found to exist in agreements entered into by two commercial parties.”); *Citizens Ins. Co. v. Proctor & Schwartz, Inc.*, 802 F. Supp. 133, 145 (W.D. Mich. 1992) (Unconscionability “is rarely found to exist in a commercial setting. Citizens has failed to show that this case presents the requisite extraordinary circumstances.”); *Salt River Project Agr. Imp. & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198, 204 (Wyo. 1984) (“Although a commercial purchaser is not doomed to failure in pressing an unconscionability claim . . . findings of unconscionability in a commercial setting are rare.”).

<sup>44</sup> See WHITE & SUMMERS, *supra* note 42, at 240 (“One moral of the foregoing cases is that when a business-person is poorly educated, ‘over a barrel,’ or a victim of fine print, a court

attitude by issuing (in dictum) a warning to corporations: “[F]or future reference we remind Northrup and companies like it that the defense of unconscionability was not invented to protect multi-billion dollar corporations against mistakes committed by their employees, and indeed has rarely succeeded outside the area of consumer contracts.”<sup>45</sup> On occasion, courts have been willing to employ unconscionability analysis in cases that do not involve extreme disparities in sophistication between the parties. However, it is

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may invalidate a clause that otherwise would stand up between ordinary business persons.”); *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296, 298, 301 (6th Cir. 1985) (Plaintiff “commercial farmers” successfully argued that the form contract was unconscionable, with the court noting “that Harris Seed is a large national producer and distributor of seed, dealing here with independent, relatively small farmers” with limited alternative suppliers who all had adopted the offensive clause.); *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 304 (E.D. Mich. 1976) (finding that an exclusion of consequential damages signed by Mobil and an illiterate, high school dropout who was a gas station dealer was unconscionable).

<sup>45</sup> *Northrup Corp. v. Litronic, Ltd.*, 29 F.3d 1173, 1179–80 (7th Cir. 1994) (cautioning Northrup after application of the knock-out rule under § 2-207 rendered its unconscionability argument moot). See also *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1365 (Fed. Cir. 1999) (rejecting application of the unconscionability doctrine in favor of a Fortune 1000 company and concluding that in “an agreement relating to confidential information, negotiated between commercial entities, it is not the judicial role to rewrite the contract and impose terms that these parties did not make.”), and *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 572, 579 (D. D.C. 1974). The court in *Potomac* stated:

Finally, plaintiff raises the issue of the unconscionability of the exculpatory clauses. The negotiated agreement between these parties was not a contract between two small unknowledgeable shop keepers but between two sophisticated corporations each with comparable bargaining power and fully aware of what they were doing. The negotiations leading to the consummation of the contract were deliberate, detailed and consumed more than two years. PEPCO’s representatives were experienced and the final agreement was reviewed by their corporate legal staff. While the evidence shows that other than Westinghouse, there was only one other domestic manufacturer with the capability of marketing the turbine-generator, there is nothing to indicate that PEPCO was precluded from contracting with that manufacturer or even foreign manufacturers. Nor is there any evidence in the record showing that PEPCO was a reluctant and unwilling purchaser, overreached and forced to yield to onerous terms imposed by Westinghouse.

*Id.* See generally NIMMER, 2 INFO. LAW, *supra* note 39, at note 9.

unlikely that these cases suggest a solid basis for developing a response to the potential abuses of click-wrap contracting.<sup>46</sup>

If unconscionability plays any role in commercial click-wrap transactions, it will almost certainly not serve as a means for launching a general challenge to this mode of contracting. In a recent

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<sup>46</sup> Perhaps the best example of such a case is *In re Teleserve Syss., Inc.* (MCI Telecomm. Corp.), 230 A.D.2d 585 (N.Y. App. Div. 1997). The court held that an arbitration clause that would require the claimant to pay a filing fee of \$204,000 to initiate its claim for compensatory damages of \$40 million was “unreasonable, unjust, and unconscionable on its face and may not be enforced.” *Id.* at 593. The claimant was a sophisticated entity that had invested over \$2.4 million dollars to build a business network to perform the contract, and had caused subagents to invest an additional \$2 million. Invoking unconscionability to protect such a party is unusual. *Id.* at 590. However, the factual context surrounding this case is dramatic. The claimant had been strung along for months by MCI despite making clear that it was in severe financial distress, and the arbitration clause in question was presented to the ailing claimant as part of modifications to their agreement intended to resolve the disputes. *Id.* at 587–90. The claimant specifically questioned the new arbitration clause, but stated that it had no choice but to sign the agreement. *Id.* at 590. The large filing fee was particularly troublesome for the claimant because it had “exhausted its capital and ‘closed its doors’” as a result of MCI’s actions, leaving it without the ability to pay the filing fee. *Id.* at 587. The facts alleged by the claimant present a classic case of economic duress and bad faith, and the court’s unconscionability holding regarding the filing fee enabled the claimant to file for arbitration under the more favorable terms of the prior agreement and to obtain a remedy for the alleged breach by MCI.

A more typical exceptional case (if there can be such a thing) is presented by *Gianni Sport Ltd. v. Gantos, Inc.*, 391 N.W.2d 760 (Mich. Ct. App. 1986). *Gianni* also involved a compelling set of facts and sharp differences in bargaining power. The buyer’s form purchase order included a clause on the reverse side that stated: “Buyer reserves the right to terminate by notice to Seller all or any part of this Purchase Order with respect to Goods that have not actually been shipped by Seller or as to Goods which are not timely delivered for any reason whatsoever.” *Id.* at 761. In late September, the buyer cancelled its June order for an October delivery of women’s holiday clothing, leaving the seller with manufactured clothes but no realistic ability to find another buyer for the time-sensitive holiday market, leading the plaintiff to sell the clothes to the original buyer for a negotiated 50% discount. *Id.* The court began by noting that Michigan case law applying the unconscionability doctrine to commercial parties “is sparse,” but found that the substantial difference in bargaining power between the small manufacturer and the large purchaser was symptomatic of the industry, and that such clauses “were standard practice because” the buyers were the “big sharks” that could impose terms at will. *Id.* at 761–62. The court affirmed the trial court’s holding that the term in question was unreasonable, and the parties had uneven bargaining power. *Id.* at 763. It should be noted that a more appropriate litigation strategy in this case would have been to challenge the buyer’s strategic cancellation and re-negotiation as a bad faith exercise of the buyer’s nominal contract rights, but perhaps the “big sharks” in this industry are so ferocious and insatiable as to render the “observance of reasonable commercial standards of fair dealing” a nullity, leading the lawyers and the court to look to the doctrine of unconscionability to find a normative limit for the buyer’s behavior.

click-wrap case a commercial party argued that imposing terms on a buyer that has already paid the purchase price by requiring consent to an End User License Agreement is unconscionable. The court made short work of this argument, finding that this manner of contracting is not in itself procedurally unconscionable.<sup>47</sup> Most courts would likely adopt this approach and conclude that merely requiring another party to signal its assent by means of a click-wrap agreement will not establish sufficient procedural infirmity to provide a basis for an unconscionability analysis.<sup>48</sup> Courts generally use a “sliding scale” approach that requires some measure of both procedural and substantive elements of unconscionability. The untroubled assumption that clicking an “I agree” icon is equivalent to manifesting assent makes it difficult to establish the existence of procedural elements of unconscionability in a commercial transaction.<sup>49</sup>

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<sup>47</sup> The court stated:

The parties in this case did have unequal bargaining power because Blizzard is the sole seller of its software licenses; however, the defendants had the choice to select a different video game, to agree to the terms and gain the software and access to battle.net, or to disagree and return the software for a full refund of their money. [The defendants were not ignorant consumers, but instead were savvy programmers who reverse engineered the source code.] Next, there was no surprise about the contract terms [because the defendants were on notice of the terms and had thirty days to return the game]. Therefore, the Court finds that the licensing agreements were not procedurally unconscionable.

Davidson & Assoc., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1179–80 (E.D. Mo. 2004). Because the EULA terms in question concerned the prohibition on reverse engineering, the court concluded without analysis that the terms did “not impose harsh or oppressive terms” and therefore were not substantively unconscionable. *Id.* at 1180. Courts sometimes note that commercial parties simply will not be given relief even from terms that are procedurally unconscionable to some degree. See *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (holding that shrink-wrap/terms-later contracting is enforceable, and noting that “courts in Louisiana and elsewhere have countenanced some modicum of adhesionary terms, or evidence of procedural unconscionability in contract formation, in the name of ‘economic efficiency’”).

<sup>48</sup> *Feldman*, 513 F. Supp. 2d, at 239–42 (holding that click-wrap contracting is not procedurally unconscionable, and the forum selection clause is not substantively unconscionable); *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341, at \*5–7 (holding that click-wrap contracting is not procedurally unconscionable, and the arbitration clause is not substantively unconscionable).

<sup>49</sup> See, e.g., *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 690 (Cal. 2000) (noting that the “more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is

On a few occasions, courts have found terms to be unconscionable even in the absence of procedural unconscionability, including the infamous shrink-wrap (terms in the box) case, *Brower v. Gateway, 2000*.<sup>50</sup> On careful examination, though, *Brower* proves that click-wrap contracts between commercial parties will not be amenable to unconscionability analysis. In *Brower*, a class of plaintiffs seeking compensatory and punitive damages for alleged deceptive practices by Gateway opposed a motion to dismiss that argued the complaint was subject to arbitration. The court first held that the agreement was a “rolling contract” that was not concluded until the consumers ordered their computer by mail or phone, received the item with the detailed terms enclosed, and then retained the item for more than the thirty-day return period specified in the enclosed terms.<sup>51</sup> The court fully effectuated the shrink-wrap contract, finding that “the disputed arbitration clause is simply one provision of the sole contract proposed between the parties,” rather than a term proposed by the seller after the purchase.<sup>52</sup> The court also specifically rejected the idea that the arbitration clause was unenforceable solely because it was contained in a standard form contract presented to the consumers. In doing so, the court reasoned that the consumers had thirty days within which to examine the product, and the proposed terms before the contract was concluded.<sup>53</sup>

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enforceable, and vice versa”); *Tacoma Boatbuilding v. Delta Fishing*, Nos. 165-72C3-168-72C3, 1980 U.S. Dist. LEXIS 17830, at \*20 n.20 (W.D. Wash. Jan. 4, 1980) (“Of course, the substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less ‘bargaining naughtiness’ that is required to establish unconscionability.”); WHITE & SUMMERS, *supra* note 42, § 4-7 (regarding the relation of procedural to substantive unconscionability and quoting the Tacoma case). If there is no recognized procedural unconscionability at work in a case involving two commercial parties, it seems highly unlikely that a court would invalidate a term of their agreement under unconscionability analysis.

In a recent article, Robert Hillman argues that proposals to require businesses to post their e-commerce terms on their website to permit consumers and industry watchdogs to review the terms prior to deciding to make a purchase might backfire because consumers are very likely to remain uninformed but the pre-disclosure would likely narrow consumer rights by eliminating a plausible claim of procedural unconscionability. Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-standard Terms Backfire?*, 104 MICH. L. REV. 837, 854 (2006).

<sup>50</sup> *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

<sup>51</sup> *Id.* at 572.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 572-73.

However, the arbitration provision required the consumers to arbitrate their disputes in Chicago pursuant to the International Chamber of Commerce ("ICC") rules. The practical effect of this term was that the typical consumer seeking actual damages of \$1,000 would have to pay a \$4,000 advance fee (including \$2,000 that was nonrefundable even if the consumer prevailed), mail all of the paperwork regarding the arbitration to the ICC offices in France, travel to Chicago for the arbitration hearing, and be subject to paying Gateway's legal fees if Gateway prevailed. Needless to say, the dispute resolution clause eliminated any practical means for consumers to obtain relief. It is widely known that the court held that this term was unconscionable, but the details of the court's reasoning are only rarely analyzed in detail.

The court first held that there were no elements of procedural unconscionability, repeating its analysis that the shrink-wrap method of contracting provided the consumer with sufficient time to review the offered terms, which were not buried in dense text or otherwise hidden from view. The court noted that "the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable."<sup>54</sup> However, one of the cases cited as a precedent provides what is certainly a more accurate description in noting that "there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone."<sup>55</sup> The *Brower* court concluded that the "excessive cost factor" in arbitrating a dispute was substantively unconscionable as a matter of law, but upheld the agreement of the parties to arbitrate their dispute in Chicago.<sup>56</sup> Thus,

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<sup>54</sup> *Id.* at 574.

<sup>55</sup> *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988) (finding that the term in question was neither procedurally nor substantively unconscionable). Most of the cases cited by the court did not find a term to be unconscionable solely on the basis of substantive oppression. One of the cited cases did refer to the classic case of a door-to-door salesperson grossly overcharging welfare recipients for consumer goods. See *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (N.Y. Sup. Ct. 1969) (but this is hardly the model of a case that involves no element of procedural unconscionability).

The court did cite *In re Teleserve Sys.*, 659 N.Y.S.2d at 659 (finding an arbitration clause between two sophisticated business entities to be unconscionable), but as explained in note 46, *supra*, the factual circumstances in this case hardly support the idea that a contract term may be declared unconscionable as a matter of law.

<sup>56</sup> *Brower*, 676 N.Y.S.2d at 574–55 ("vacating that portion of the arbitration agreement as requires arbitration before the International Chamber of Commerce," having already found that "the possible inconvenience of the chosen site (Chicago) alone" does not rise "to the

the victory was not particularly meaningful for the plaintiffs now faced with the obligation to travel to Chicago to seek arbitration of their individual claims, rather than pursuing a class action.

There are cases that take a more liberal approach to unconscionability in the electronic contracting setting, but these cases are undoubtedly outliers. A Pennsylvania Federal District Court Judge, applying California law, recently ruled in *Bragg v. Linden Research, Inc.*<sup>57</sup> that a click-wrap agreement to arbitrate disputes was both procedurally and substantively unconscionable. This result is even more extraordinary in light of the fact that the plaintiff was an attorney who sued a virtual world Internet website for seizing “virtual” property worth thousands of dollars that he had acquired at the site. Essentially, the court held that a sophisticated plaintiff engaged in (virtual) commercial transactions was not subject to an arbitration clause contained in a click-wrap contract.

In *Bragg*, the court first held that the arbitration clause included in the “fourteenth line of the thirteenth paragraph under the heading ‘GENERAL PROVISIONS’ and following provisions regarding the applicability of export and import laws” was procedurally unconscionable because it was part of an adhesion contract presented by a party with stronger bargaining power regarding a product that could not be attained elsewhere on the Internet.<sup>58</sup> The court found that the arbitration clause was “buried” in the Terms of Service, and that these Terms included no explanation of, or reference to, the extensive fees and cumbersome rules that were triggered by requiring arbitration by three arbitrators operating under the Rules of Arbitration of the ICC.<sup>59</sup> The court conceded that Bragg’s sophistication mitigated the elements of procedural unconscionability, but that the weakness of this element was counterbalanced by extreme substantive unconscionability.<sup>60</sup>

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level of unconscionability”). See also *Hauenstein v. Softwrap Ltd.*, No. Co7-0572MJP, 2007 WL 2404624 (W.D. Wash. Aug. 17, 2007) (holding that an arbitration clause requiring that the parties arbitrate in London is not unconscionable).

<sup>57</sup> *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

<sup>58</sup> *Id.* at 603–04. The court cited *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) for support, but the district court in *Comb* emphasized that PayPal customers were not sophisticated parties, the average transaction amount was \$55, and the services offered by PayPal might have been unique to some degree. *Id.* at 1173.

<sup>59</sup> *Bragg*, 487 F.Supp. 2d at 606.

<sup>60</sup> *Id.* at 606–10.

Similar to the arbitration provision in *Brower*, Bragg was required to arbitrate his disputes under the costly ICC rules in a distant venue, whereas the defendant was permitted to seize his assets and terminate the agreement at its sole discretion.<sup>61</sup> The court essentially concluded that the agreement precluded an effective remedy for breach, providing instead a “one-sided means which tilts unfairly, in almost all situations” in favor of the defendant.<sup>62</sup> In the end, *Bragg* appears to be the same case as *Brower* with the one critical difference that, rather than relying exclusively on substantive unconscionability, the court found that California law considers all adhesion contracts to be prima facie evidence of procedural unconscionability.<sup>63</sup>

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<sup>61</sup> *Id.* at 607–12.

<sup>62</sup> *Id.* at 611.

<sup>63</sup> The California Supreme Court has not yet adopted this reading of the unconscionability statute, but the federal courts in *Bragg* and *Comb* both cited *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (1st Dist. 2001) for this proposition. This element of the *Flores* opinion has been criticized by other divisions of the Court of Appeals. See *Morris v. Redwood Empire Bancorp.*, 128 Cal. App. 4th 1305, 1318 (4th Dist. 2005) (The court criticized *Flores* by noting that “courts often reflexively conclude the finding of an adhesion contract alone satisfies the procedural prong, and immediately move on to the subject of substantive unconscionability,” and holding that recognizing the agreement “as an adhesion contract . . . heralds the beginning, not the end, of our inquiry into its enforceability.”). Consequently, not all courts endorse the *Flores* rule. See *Burke v. E-Bay, Inc.*, 2007 WL 1219697 (W.D. Ark. Apr. 24, 2007) (finding that the forum selection clause under a later iteration of the eBay agreement that was at issue in *Comb* was enforceable).

The Ninth Circuit’s recent opinion in *Nagramp v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) provides a good indication of the current state of California law. By a 7–5 margin, the court held that an arbitration provision in a click-wrap contract was unconscionable. Finding that under “current California law, it is unclear whether a contract of adhesion is inherently oppressive, and therefore automatically procedurally unconscionable or whether oppression is a separate element that must be present,” the court concluded that procedural unconscionability is present when an adhesion contract is presented by a party with superior bargaining power to a party that has no meaningful choice or ability to negotiate. *Id.* at 1281. Although the contract was a commercial franchise agreement offered to a sophisticated party with experience in the industry, the court concluded that “MailCoups had overwhelming bargaining power, drafted the contract, and presented it to Nagrampa on a take-it-or-leave-it basis. While we acknowledge that the evidence of procedural unconscionability appears minimal, it is sufficient to require us, under California law, to reach the second prong of the unconscionability analysis.” *Id.* at 1284. The arbitration provision was deemed substantively unconscionable because it permitted MailCoups to secure judicial relief and forced the plaintiff to travel to Boston to arbitrate her claims, and so “even though the evidence of procedural unconscionability is slight, the evidence of substantive unconscionability is strong enough to tip the scale and render the arbitration provision unconscionable.” *Id.* at 1293. Because California law requires some measure of procedural unconscionability to support an unconscionability analysis, the



Against this backdrop, the doctrine of unconscionability does not hold much promise for commercial parties after the battle of the forms has ceased to provide them with force-field like protection. Although it is conceivable that courts might act if one or more terms imposed by a click-wrap agreement are grossly oppressive, it is far more likely that they would do so if there was some measure of

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*Flores* rule might best be interpreted as boosting a party over the nominal procedural unconscionability requirement when the complaining party is in a much weaker position and is subjected to an adhesion contract that contains terms that are grossly unfair that the court deems unacceptable. See *Pickens v. Blockbuster, Inc.*, 2004 WL 339594, \*7 (Cal. App. Feb. 24, 2004) (unpublished opinion) (The court held that because “the only procedurally unconscionable aspect of the late fee [that the consumer plaintiff] can identify is the fact that it was presented as part of a take-it-or-leave-it contract . . . this may be enough to show a minimal level of procedural unconscionability [but the consumer plaintiff] must make a correspondingly much stronger showing of substantive unconscionability to survive summary judgment.”).

Consequently, the surprising result in *Bragg* may not suggest that click-wrap commercial contracts may easily be found to be unconscionable. The limitations of the *Bragg* case are best illustrated in a case decided by the same court, speaking through a different judge, two months earlier. In *Feldman v. Google, Inc.*, 2007 WL 966011 (E.D. Pa. Mar. 29, 2007) the court found that a lawyer’s click-wrap agreement for Google’s advertising services was enforceable under California law, concluding that a “reasonably prudent internet user would have known of the existence of terms in the AdWords agreement.” *Id.* at \*9. The court found that the forum selection clause was not unconscionable, beginning with the decisive characterization that *Flores* provides that a term “*may be procedurally unconscionable if it is an adhesion contract.*” *Id.* at \*10 (emphasis added). Because other internet businesses offered advertising services, the court also concluded that the agreement was not a classic adhesion contract.

A contract is not necessarily one of adhesion simply because it is a form contract. Courts have recognized the prevalence and importance of standardized contracts in people’s everyday lives. . . . Because Plaintiff was a sophisticated purchaser, was not in any way pressured to agree to the AdWords Agreement, was capable of understanding the Agreement’s terms, consented to them, and could have rejected the Agreement with impunity, this court finds that the AdWords Agreement was not procedurally unconscionable.

*Id.* at \*11. This case, seemingly directly at odds with the result in *Bragg* two months later, would appear to capture the sentiment of a strong majority of courts. See *supra* notes 47–48 and accompanying text.

The cases can also be distinguished by the fact that *Bragg* concerned a grossly unfair dispute resolution clause that effectively eliminated an effective remedy, whereas *Feldman* involved only a forum selection clause. The lesson of the *Bragg* case appears to be that courts might find a clause unconscionable even in a commercial transaction under extreme facts. See sources cited *supra* note 46 and accompanying text.

procedural unconscionability as well. In most jurisdictions, the case law indicates clearly that courts are highly unlikely to find that the click-wrap format itself gives rise to a claim of procedural unconscionability between commercial parties. *Bragg* provides precedent to the contrary, but it establishes a minimum of procedural unconscionability only on the strength of the court's finding that California law so regards all adhesion contracts.<sup>64</sup>

## B. JUDICIAL ENFORCEMENT OF THE REASONABLE EXPECTATIONS OF COMMERCIAL PARTIES

Click-wrap contracting is a mode of presenting standard terms in what might be argued is a more "adhesive" mode than traditional standard form agreements because there is no fine print on the reverse side of a document that conceivably could be crossed out or changed prior to signing.<sup>65</sup> As a general rule, courts interpret adhesion contracts strictly against a commercial party seeking the assent of a consumer, resulting in a kind of "*super contra proferentem*." In some cases the courts' analysis outstrips the boundaries of *contra proferentem* entirely, and results in decisions that the terms of an adhesion contract simply will not be enforced when they deviate from the reasonable expectations of the parties.

The modern "Doctrine of Reasonable Expectations" was conceptualized by Robert Keeton to explain a number of insurance coverage cases that otherwise lacked a coherent and consistent justification.<sup>66</sup> Once articulated, a number of states actively developed

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<sup>64</sup> This makes choice of law provisions in click-wrap agreements even more important, as demonstrated in *Wilmot v. McNabb*, 269 F. Supp. 2d 1203, 1209 (N.D. Cal. 2003) (finding that the venue provision was unconscionable under California law, but noting that the result would have been different under Colorado law).

<sup>65</sup> Some cases suggest that click-wrap contracts are designed to discourage review of the terms by the buyer. See Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1043-45 (2005) (citing *Scarcella v. Am. Online, Inc.*, 2004 WL 2093429 (N.Y. Civ. Ct. Sept. 8, 2004) as an example). See sources cited *supra* note 26 that lend support to a criticism of courts that are unwilling to assess the cognitive differences between a consumer signing a paper form with boilerplate terms and that same consumer engaging in click-wrap contracting, and that can be extended to a broader critique of the assumptions about commercial parties.

<sup>66</sup> See Robert E. Keeton, *Insurance Rights at Variance With Policy Provisions: Part One*, 83 HARV. L. REV. 961, 967 (1970) (arguing that "[t]he objectively reasonable expectations of the applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provision would have negated those expectations"). Subsequent academic commentary on the Doctrine of Reasonable

the Doctrine by expressly interpreting insurance policies in a manner that could not be squared with the precise language of the policy, effectively broadening the coverage afforded thereby.<sup>67</sup> These courts openly acknowledged that the development of the Doctrine of Reasonable Expectations was a necessary adjustment to fundamental shifts in the formation of insurance contracts since the days when ship owners and underwriters negotiated coverage in Lloyd's Coffee House.<sup>68</sup> However, there is nothing intrinsic to the Doctrine of

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Expectations includes: Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729 (2000); Symposium: *The Insurance Law Doctrine of Reasonable Expectations After Three Decades*, 5 CONN. INS. L.J. 1 (1998); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823 (1990); Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986); Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

<sup>67</sup> As Kenneth Abraham has suggested, in addition to making insurance law, judges sometimes make insurance. KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 100–32 (1986).

<sup>68</sup> See *Zuckerman v. Transamerica Ins. Co.*, 650 P.2d 441 (Ariz. 1982), in which the court made this point clearly:

Thus, if this were the ordinary contract, we would have no hesitation in holding the parties to their agreement, providing the limitation period was not so short as to be against public policy and that the terms of the contract were not so unconscionable that unfair advantage was being taken of the person in an inferior bargaining position. Whatever the historic origin of the insurance contract, we cannot close our eyes to present-day reality. An insurance agreement such as the ordinary fire policy in issue here is not a contract arrived at by negotiation between the parties. The insured is given no choice regarding terms and conditions of coverage which are contained on forms which the insured seldom sees before purchase of the policy, which often are difficult to understand, and which usually are neither read nor expected to be read by either the person who sells the policy or the person who buys it. This is not the traditional method by which contracts, including insurance contracts, have been made. The changes which have come into the insurance business over the last 50 years reflect the industry's adjustment to modern business conditions and necessities. The rules pertaining to the enforcement of the "bargain" made by the parties evolved at a time when the parties negotiated an insurance contract; they have little or no relevance to the present methods of transacting most insurance business. This principle is being increasingly recognized by the courts.

*Id.* at 446 (internal citations omitted). See also *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 196 (Pa. 1977) (The court held that prior case law insisting on strict readings of insurance contracts "fails to recognize the true nature of the relationship between

Reasonable Expectations that limits its application only to the insurance context or only to transactions between consumers and large, sophisticated entities selling a complex product.<sup>69</sup> Indeed, the Doctrine of Reasonable Expectations grew out of a more general doctrinal orientation that attempted to address core questions at the heart of contract law regarding assent, and it represented a response

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insurance companies and their insured. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured.”).

<sup>69</sup> Courts have been reluctant even within the insurance setting to favor policyholders in situations where the policyholder is sophisticated and heavily involved in the development of the policy language. This trend suggests that it is not so much the nature of the insurance business that drives the Doctrine of Reasonable Expectations as the fact that many insurance coverage cases present prototypical consumer adhesion contracts even if the insured is a commercial entity. The “sophisticated insured” doctrine recognizes that in some cases equally sophisticated parties have negotiated the policy terms. *Compare* E. Associated Coal Corp. v. Aetna Casualty & Surety Co., 632 F.2d 1068, 1075 (3d Cir. 1980) (applying Pennsylvania law and declaring that “the principle that ambiguities in policies should be strictly construed against the insurer does not control the situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy.”), *cert. denied*, 451 U.S. 986 (1981), and *McNeilab, Inc. v. N. River Ins. Co.*, 645 F. Supp. 525, 547 (D.N.J. 1986), *aff’d*, 831 F.2d 287 (3d Cir. 1987) (concluding that *contra proferentem* could not be applied because the corporate insured was large, sophisticated, and aided by counsel in negotiating the policy, which included fifteen separate addenda), *with* *Turner & Newall, P.L.C. v. Am. Mut. Liab. Ins. Co.*, 1985 WL 8056 (D.D.C. Aug. 1, 1985) (rejecting the interpretation of *Eastern Associated* and applying *contra proferentem* in a case involving a commercial insured). The *Turner* Court concluded:

After reviewing the cited authorities, the court finds that it is consistent with general authority and Pennsylvania law to construe this provision against the insurer if it is found to be ambiguous, because as the drafter of the provision, the insurer should bear the risk that when a dispute arises over precisely which stockholders are additional insureds and under what circumstances, the insurer’s failure to be precise should not inure to its benefit. Thus, the better rule, and the one followed in Pennsylvania, is to construe against the drafter of an agreement by virtue of its control over the words chosen.

*Turner*, 1985 WL 8056 at \*4. See generally Jeffrey W. Stempel, *Reassessing the “Sophisticated” Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 849–56 (1993) (surveying the cases and suggesting that commercial parties might still receive the benefits of *contra proferentem* and the Doctrine of Reasonable Expectations, but that the insured’s sophistication would be taken into account through a number of factors such as whether the commercial party participated in the drafting of the policy language and whether the party had access to a competitive market for the product and the means to appreciate the different coverage terms offered); Swisher, *supra* note 66, at 737–40.

to dramatic changes in the manner in which policies were drafted for, marketed to, and procured by, insureds.<sup>70</sup>

Karl Llewellyn anticipated that something close to the Doctrine of Reasonable Expectations would be a necessary response to the breakdown of individualized contracting in the twentieth century with the advent of standard form mass contracting.<sup>71</sup> Llewellyn did not

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<sup>70</sup> Protecting reasonable expectations is a central goal of our legal system, even if the principle does not provide determinant guidance in particular cases. For a general assessment of this principle, see Bailey H. Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863 (2001). Kuklin concludes that the principle is “a powerful force driving the law” that occupies a “place near the pinnacle of legal precepts,” but that it “works poorly as a spotlight when invoked to resolve close legal issues.” *Id.* at 905. Thus, the principle will not provide sufficient guidance to resolve specific cases, but it can provide a guiding norm in the case-by-case effort to police the margins.

Some might argue that the Doctrine of Reasonable Expectations is peculiarly suited to consumer purchases of insurance, a setting in which it is only contract rights that are purchased and these rights are all but incomprehensible to most purchasers. The aleatory nature of the insurance relationship is a relevant difference, but one that imports no overriding distinction. It may be true that a party that purchases goods wants the goods and couldn't care less about the boilerplate contract language, but it is equally true that a party that purchases insurance wants to receive a cash payment when it suffers a loss and doesn't really care about the contract language. Nevertheless, it is true that there is an important (and generally unacknowledged) distinction between insurance policies and commercial contracts: public policy favors insurance coverage and courts are more willing to impose contractual obligations on insurers who already operate in a heavily regulated environment. Even this difference doesn't undermine the application of the Doctrine of Reasonable Expectations to commercial transactions as much as suggest that the contours of applying this doctrine will be different in practice.

<sup>71</sup> As Robert Jerry describes, Llewellyn was one of the first thinkers to address the problem of adhesion contracts by suggesting something akin to the Doctrine of Reasonable Expectations articulated by Keeton in 1970. Jerry discusses Alan Schwartz's research:

which shows that Llewellyn had focused on the link between reasonable expectations and standardization at least two decades before [Friedrich Kessler's seminal article in 1943]. In a 1925 article published in the *American Economic Review*, Llewellyn recommended that courts read contracts to contain what the weaker party would expect the contract to contain, and he used the example of insurance contracts to make his point. Specifically, he advocated giving “the insured . . . the protection he might decently believe he was buying, without too close regard to the exceptions of the policy.” In so many words, this was the Keeton formulation of the reasonable expectations doctrine . . . .

. . . In his early sales scholarship, Llewellyn considered many of the same issues with respect to standardized sales contracts that Keeton considered with respect to insurance policies. Llewellyn urged in no

view the Doctrine as an atavistic reaction against standard form contracts; to the contrary, he viewed it as a necessary development to support the widespread use of standard forms. In a book review published in 1939, he emphasized that standardized forms met a “real need,” but that “the presuppositions of our general law no longer maintain in such a situation.”<sup>72</sup> In his characteristic prose style, Llewellyn admitted that judicial competency is limited, but insisted that common law judges are well suited to recognize that “where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.”<sup>73</sup> Admittedly, attention was focused on consumers who should not be bound strictly to all of the terms of an adhesion contract. However, it is important not to forget that Llewellyn was equally concerned with businesses that suffered as a result of the misguided application of classical contract law principles. As paper

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uncertain terms that plain text in standardized sales contracts should be given a meaning that a reasonable consumer would expect in the circumstances. Kessler built upon these same points in his *Columbia Law Review* article. Almost fifty years after Llewellyn and approximately twenty-five years after Kessler, Keeton found evidence that courts were reaching exactly that conclusion in the decided insurance cases under a wide range of doctrinal theories. These common insights and shared principles should not surprise us; after all, insurance policies are but one kind of standardized form.

Jerry, *supra* note 41, at 46–47.

The relative purity of Llewellyn’s vision was muddled in the long effort to secure adoption of the Uniform Commercial Code, leading to the need to incorporate more express acceptance of “freedom of contract” principles as understood by formalists in the 1950’s. Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code: 1949-1954*, 49 BUFF. L. REV. 359 (2001). This is not to say that Article 2 was stripped of its inventiveness entirely: “Even though the 1957 code was much chastened from what it might have been had it been drafted during the 1930s, it was still viewed in some quarters as ‘paternalistic’ and a ‘leftist’ attempt to reallocate wealth.” Curtis Nyquist, *Llewellyn’s Code as a Reflection of Legal Consciousness*, 40 NEW ENG. L. REV. 419, 421 (2006); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALBANY L. REV. 325, 395 (1995). Moreover, even if Article 2 was somewhat chastened, Llewellyn was not. As described in the following text, Llewellyn held firm to his initial intuitions about standard form contracts.

<sup>72</sup> K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 700–01 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

<sup>73</sup> *Id.* at 704.

standardized forms came into widespread use, the problem confronting businesses was the incompatibility of their battling forms. Llewellyn's statutory innovation to protect businesses engaged in the battle of the forms was § 2-207, which ensured both that a contract was recognized and that one party would not succeed in having all of its terms enforced. The solution provided by § 2-207 made direct judicial enforcement of the parties' reasonable expectations unnecessary because § 2-207 empowered commercial parties to utilize competing standard forms as force-fields that effectively protected their reasonable expectations.

Near the end of his career, Llewellyn offered his much-cited, but too infrequently examined, thesis of "blanket assent" to ensure the protection of reasonable expectations. In his magisterial book, *The Common Law Tradition: Deciding Appeals*, Llewellyn discusses the problem created by enforcing standard form contracts in the course of explaining how judges and scholars work to adjust the law to changing social circumstances.<sup>74</sup> Llewellyn first acknowledges that standard form contracts play a vital role in a modern economy.<sup>75</sup> Indeed, he goes so far as to suggest that standard form agreements that emerge from balanced negotiations within an industry should be enforced by courts in recognition that these form agreements provide "the road to better than official-legal regulation of our economic life; indeed, they tend to lead into the setting up of their own quick, cheap, expert tribunals."<sup>76</sup> Llewellyn was an economic realist who understood the need for order and dependability in a well-functioning commercial market.

But Llewellyn also understood that the private power conferred on commercial parties by classical contract doctrine could be abused to the detriment of those people who assume that they are placing their heads in the mouth of a "sweet and gentle lion."<sup>77</sup> Llewellyn noted

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<sup>74</sup> Llewellyn argues that boilerplate agreements are an example of how "the clan of legal scholars and the tribe of appellate judges are allies willy-nilly in the Herculean labor of producing and expanding order in our legal doctrine . . . ." LLEWELLYN, *supra* note 1, at 361-62.

<sup>75</sup> Llewellyn suggests that form agreements with sweeping clauses protect businesses from excessive risks (he cites the problem of the seed company defending itself in front of a jury of farmers in a case involving a farmer's loss of an entire crop) and suggests that it might make sense simply to bar all claims so as to permit a fair-minded company to create exceptions for contracting partners who raise meritorious claims. *Id.* at 363.

<sup>76</sup> *Id.*

<sup>77</sup> Llewellyn captures the situation in his familiar prose style:

that broad clauses in the drafter's favor are sometimes written in a manner that confers too much discretion, which is problematic for the simple reason that not all companies are gentle lions, and even sweet lions can make mistakes sometimes.<sup>78</sup> The classical common law courts approached the problem in a wholly unrealistic manner, Llewellyn argued, because they unpredictably read the form agreement literally, in a bow to freedom of contract, and then later in their analysis they unpredictably refused to enforce terms they deemed to be "indecent."<sup>79</sup> Citing Dawson's comparative analysis of the German system, and his own book review of a text on English and continental law, Llewellyn argued that scholars were only beginning to point the way to a realistic approach to standard form agreements.<sup>80</sup>

Llewellyn's famous response to the challenge presented by standard form agreements was to recognize that assent had become a two-tiered reality. When a party is presented with a standard form agreement:

[T]he boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair. Such is the reality, and I see nothing in the way of a court's operating on that basis, to truly effectuate the only intention which can in reason be worked out as common to the two parties, granted good faith. And if the boiler-plate party is not playing in good faith, there is law enough to bar that fact from benefiting it. We had a hundred years of sales law in which any sales transaction with explicit words

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Power, like greed, if it does not always corrupt, goes easily to the head. So that form-agreements tend either at once or over the years, and often by whole lines of trade, into a massive and almost terrifying jug-handled character; the one party lays his head into the mouth of a lion—either, and mostly, without reading the fine print, or occasionally in hope and expectation (not infrequently solid) that it will be a sweet and gentle lion.

*Id.* at 362.

<sup>78</sup> *Id.* at 362.

<sup>79</sup> *Id.* at 364–65.

<sup>80</sup> *Id.* at 365–66.



resulted in two several contracts for the one consideration: that of sale, and the collateral one of warranty. The idea is applicable here, for better reason: any contract with boilerplate results in *two* several contracts: the *dickered* deal, and the collateral one of *supplementary* boilerplate. Rooted in sense, history, and simplicity, it is an answer which could occur to anyone.<sup>81</sup>

Llewellyn argued that commentators and courts would converge on the theory of blanket assent as the best interpretation of contract law in light of modern economic conditions.<sup>82</sup>

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<sup>81</sup> *Id.* at 371. As one commentator explains,

[Llewellyn's] theory provides both a rationale for upholding most standard-form contracts—at least insofar as they are not unreasonable or indecent—and also an understanding of what is actually going on in the customer's mind. . . . If the term is central to the agreement—a dickered or negotiated term in Llewellyn's parlance—then it will be given wide deference. On the other hand where the terms are not negotiated and are peripheral to the basic agreement, then, in fairness, the court should take a closer look, if only because the imbalance of power between the parties means that the term will, in all likelihood, have been drafted in a manner most favorable to the drafting party. If so, and the resulting term is either 'unreasonable' or 'indecent,' the court can find that there was no actual assent and refuse to enforce the term. The court, through this kind of scrutiny, can ensure that the overall contract remains balanced.

Oakley, *supra* note 65, at 1054–55.

<sup>82</sup> Llewellyn noted that the theory of blanket assent would not protect a party who has read and expressly manifested assent to an indecent clause, but he suggested that these rare cases could be handled by a bit of slight-of-hand.

The one case in a thousand where the dirty clauses have been read and truly agreed to can, for my money, be discarded both as *de minimus* and to keep that issue from disturbing all the litigation to which it is in fact irrelevant. The common law technique, when the facts run so profusely in a single direction, would be a simple "conclusive presumption"—that boiler-plate has *not* been read.

LLEWELLYN, *supra* note 1, at 391. Llewellyn's uncharacteristic use of a "covert tool" may have been a prescient suggestion for how to deal with the increasingly specific means by which click-through agreements are reached, such as requiring the party to check individual paragraphs, to scroll through the entire list of terms before clicking "I agree," etc.

As we transition to a single electronic form with terms that are present only virtually, the time is ripe to consider whether some form of the Doctrine of Reasonable Expectations makes sense even in non-consumer contexts. To borrow Professor Jerry's phrase, to do so would be to launch a major offensive in the battle for the soul of contract law.<sup>83</sup> Admittedly, this assault might prove to be the Pickett's Charge of legal functionalism, resulting in a decisive victory for formalists. But, this may be the best and most honest response to the looming irrelevance of § 2-207.

It is important to emphasize that I am arguing in favor of judicial efforts to police the margins of contracting by commercial parties by reinvigorating the Doctrine of Reasonable Expectations. The failed effort to amend Article 2 has many facets, but certainly the initial draft

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<sup>83</sup> Jerry's prose is worth quoting at length:

Throughout most of the twentieth century, courts and scholars have battled for the soul of contract law. On one side are the formalists or classicists, whose champions are Professor Williston and the first *Restatement of Contracts*. The formalists care mightily about texts and the four corners of documents. . . .

...

The other contestants in the battle for the soul of contract law are the functionalists, who are sometimes also labeled as the progressives, the realists, or the post-classicists. The champions of this side are Professor Corbin and the *Restatement (Second) of Contracts*. . . . Where a form is standardized, the functionalists substitute objectively reasonable expectations for whatever the particular recipient of the form understood, given that the recipient has less reason to know what the drafter means, while the drafter has insights into what the ordinary, reasonable recipient of the form is likely to understand. In the functionalists' world, Judge Keeton's doctrine of reasonable expectations is far from threatening. Indeed insurance law's doctrine of reasonable expectation simply restates for insurance lawyers what contract law is (or should be) saying to all lawyers.

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This means that Judge Keeton's article is not just about insurance law; it speaks to consumers and businesses in any industry where standardized forms are used. Thus, the debate over reasonable expectations is not just an insurance law debate. It is a contract law debate, and the prize to the winner is ownership of a major piece of the soul of contract law.

Jerry, *supra* note 41, at 55-56.

providing consumer protection modeled on the doctrine of reasonable expectations was controversial and drew the ire of industry. As Braucher advises, this experience suggests that uniform regulatory approaches to this problem are not likely to succeed politically and, in fact, may be counterproductive in light of the need for experimentation and attention to context.<sup>84</sup> Even if large consumer

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<sup>84</sup> Braucher writes:

An obvious way to attempt to reduce political objection to special policing of SFKS [standard form contracts] is to limit the category to which heightened policing applies. Limitations to consumer contracts . . . is the narrowest strategy of this type, but even that focus has proved controversial in the UCC revision process. For example, the Article 2 revision project initially undertook to make a version of the common law "reasonable expectations" doctrine (making terms contrary to reasonable expectations unenforceable) explicitly applicable to sales of goods to consumers. However, even with a narrow focus on consumer contracts, the effort was beaten back and eventually abandoned by the Article 2 drafting committee. In the face of political deadlock in the uniform laws process, it may be time to think about nonuniform state law as a vehicle to begin experimentation with new and more effective methods of policing SFKS.

Braucher, *supra* note 27, at 417–18.

The original Reporter for the Article 2 revision process, Richard Speidel, describes how strong sellers "beat back" the attempt to expressly include the Doctrine of Reasonable Expectations on behalf of consumers by convincing the NCCUSL leadership that they would block enactment of Revised Article 2. Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTINGS L.J. 607, 610 (2001). He suggests that the reason the original draft was "hung out to dry" leaving "protection for consumers and small businesses . . . to section 2-302 and the comments," was that the "strong sellers" were content with existing Article 2: "Limited only by the porous doctrines of unconscionability and good faith, strong sellers are able to shape the contract to fit their interests, particularly where small business and consumers were involved." *Id.* at 616, 618.

All this leads me to conclude that the courts, whatever their drawbacks, will have to provide the solution to problems that arise after the battle of the forms has ended. Uniform regulation is now all but unthinkable, and state-by-state regulatory reform is certain to confront the same unified opposition that stymied efforts to revise Article 2.

Clayton Gillette's recent hypothesis that protecting consumers from abusive rolling contracts is best accomplished not by relying solely on market constraints, but also by *ex ante* supervision of contract terms by regulators and *ex post* regulation by courts, while carefully argued and fairly noting the advantages and disadvantages of each mechanism, would seem to be unrealistic in the present environment. See Gillette, *supra* note 36, at 722 (admitting that no third-party "agent" will be a perfect surrogate for the contracting party, but arguing that a judicious mix of all three mechanisms is probably desirable).

goods manufacturers were justified in their fear that statutory recognition of the Doctrine of Reasonable Expectations on behalf of consumers would amount to a formless and unpredictable rule,<sup>85</sup> the

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In contrast, Robert Oakley concludes that courts currently apply an unconscionability standard that is more demanding than Llewellyn's test and that the Doctrine of Reasonable Expectations holds no great promise outside the context of insurance law, Oakley, *supra* note 65, at 1056, 1065 [I think both pages are relevant to the cite] but his suggestion that consumer protection legislation be enacted based on the E.U. Directive on Unfair Contract Terms (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts) and the "Stop Before You Click" principles developed by the Americans for Fair Electronic Commerce Transactions with respect to the licensing of computer information, *id.* at 1065–71, 1071–1100, appears even more unlikely to address the problem.

Perhaps well-defined rules for the consumer sector might be successfully enacted in some states (e.g., you can't require a consumer to arbitrate a \$500 dispute in a distant locale), but any such reforms will almost certainly not extend to the commercial parties that are the focus of this article.

<sup>85</sup> In early drafts of Revised Article 2, the drafting committee incorporated the Reasonable Expectations Doctrine to deal with standard form contracts presented to consumers. The draft presented for discussion at the NCCUSL 1996 Annual Meeting included the following:

SECTION 2-206. STANDARD FORM RECORDS.

(a) If all of the terms of a contract are contained in a record which is a standard form or contains standard terms and the party who did not prepare the record manifests assent to it by a signature or other conduct, that party adopts all terms contained in record as part of the contract except those terms that are unconscionable.

(b) A term in a record which is a standard form or which contains standard terms to which a consumer has manifested assent by a signature or other conduct is not part of the contract if the consumer could not reasonably have expected it unless the consumer expressly agrees to the term. In determining whether a term is part of the contract, the court shall consider the content, language, and presentation of the standard form or standard term.

(c) A term adopted under subsection (a) becomes part of the contract without regard to the knowledge or understanding of individual terms by the party assenting to the standard form record, whether or not the party read the form.

Uniform Commercial Code, National Conference of Commissioners of Uniform State Laws, <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2sale.htm> (last visited Apr. 4, 2008). This approach was altered substantially. The March 1, 1999, draft of Revised Article 2 read as follows:

situation is different when considering transactions between businesses that were formerly concluded with a battle of forms. In commercial transactions, there are more well-defined notions of unacceptable business contracting practices that can inform the Doctrine of Reasonable Expectations as a means for policing the fringes.<sup>86</sup> In defending the notion of “blanket assent,” Llewellyn admitted that a statutory solution to the problem of policing terms is “likely to be both awkward in manner and deficient or spotty in scope”<sup>87</sup>; for this reason judicial enforcement of reasonable expectations provides the best mechanism for adjusting the law to modern social and economic reality, at least in the first instance.<sup>88</sup> In

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SECTION 2-206. UNENFORCEABLE TERMS IN CONSUMER CONTRACTS.

(a) In a consumer contract, a court may refuse to enforce a standard term in a record the inclusion of which was materially inconsistent with reasonable commercial standards of fair dealing in contracts of that type, or, subject to Section 2-202, conflicts with one or more nonstandard terms in the record.

(b) If it is claimed or appears to the court that any term of a consumer contract may be unenforceable, the parties, to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to the term's commercial setting, purpose, and effect or as to whether it was consistent with reasonable commercial standards of fair dealing in contracts of that type.

(c) This section does not apply to a term disclaiming or modifying an implied warranty that complies with Section 2-406.

Revision of Uniform Commercial Code Article 2—Sales, National Conference of Commissioners on Uniform State Laws, <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2399.htm> (last visited Apr. 4, 2008). Ultimately, as finally adopted, Amended Article 2 contains no element of consumer protection specifically with regard to standard form agreements.

<sup>86</sup> Article 2 is built on this assumption, with “reasonable commercial practices” providing much of the guidance in the statutory provisions. Although we might debate the extent to which trade usage is sufficiently definite to provide terms of the parties’ contract, there is far more likelihood that business mores, as revealed through expert testimony and careful attention to the facts of the case, will sufficiently identify extreme, unacceptable contracting behavior on the fringes of commercial practice.

<sup>87</sup> LLEWELLYN, *supra* note 1, at 370.

<sup>88</sup> Llewellyn’s famous lectures in German on the case law system in America discuss the how the interaction of case law precedent and the formulation of statutes can be maximized:

the remainder of this article, I analyze how courts can utilize the existing Doctrine of Reasonable Expectations for the limited purpose of ensuring that commercial contracting retains its integrity after the demise of the battle of the forms.

### 1. THE DOCTRINE OF REASONABLE EXPECTATIONS

The Doctrine of Reasonable Expectations is embodied in § 211 of the Restatement (Second) of Contracts, which pertains to the interpretation of standard form contracts generally, and is not limited to consumer contexts.<sup>89</sup> Indeed, Restatement § 211 reflects the

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At the [start of developing new law], both the insight and experience necessary to create a statute are lacking. A statute passed under such circumstances is a far greater misfortune than any misstep taken by a case law court. But if enough cases are available, if enough experience has been amassed to make an incisive diagnosis possible, a statute can more much more directly and efficiently toward its real goal than the pure tradition-bound case law method. Once a statute is adopted, though, there is room *again* for the case law method, for only through it can legislative insight be elaborated, corrected, and perfected in light of the subsequent, unforeseen cases. Optimally, a statute will create a new goal and a new means to achieve it, but never the ultimate particularized solution which is finally achieved—knowingly or unknowingly, admitted or kept under wraps—only through judicial decision.

KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 67 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (1933). Given the inability to craft a satisfactory uniform law solution to the problem, Llewellyn would undoubtedly urge courts to develop case law that could serve as the resource for an eventual statutory scheme. This appears to be the path followed by the German courts and legislature. *See infra* notes 116–21 and accompanying text.

<sup>89</sup> The provision reads as follows:

#### § 211. Standardized Agreements

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

broader principle broached by Llewellyn, and then developed principally in the insurance context.<sup>90</sup> Section 211 provides a relatively simple framework for effectuating the terms of a form agreement. A party is bound to the terms of a standard form when it manifests assent with the knowledge that such a form regularly embodies terms of the agreement, but the terms are interpreted in an objective manner (“treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms”).<sup>91</sup> However, the reasonable expectations of the party assenting to the form may trump the terms as written when the offering party “has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term.”<sup>92</sup> This carefully worded exception ensures that the reasonable expectations of *both* parties are honored. Comment (f) provides the rationale for this rule:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable

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(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211 (1980). Recent cases applying Restatement § 211 in non-insurance disputes include: *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1048 (Ariz. Ct. App. 2005) (holding that an arbitration clause in a home construction contract did not violate reasonable expectations); *Broemmer v. Abortion Serv. of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992) (holding that an arbitration clause was not enforceable in a case involving physical injury, where the patient, in a state of emotional upset, signed a contract containing an arbitration clause requiring that a doctor of the same specialty as the defendant serve as the arbitrator); and cases cited in note 93, *infra*.

<sup>90</sup> See Friedman, *supra* note 12, at 41 (characterizing § 211 as embodying Llewellyn’s approach). Llewellyn expressly drew from the same insurance cases that formed the basis of Keeton’s article, arguing that the theory of blanket assent was used by courts in situations where the fine print followed the contracting (such as the purchase of an insurance policy), but that the theory was equally applicable to all form agreements. LLEWELLYN, *supra* note 1, at 370.

<sup>91</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211(1), (2). This rule recognizes that the point of a standard form is that it is not intended to be read, but rather is accepted by parties that “trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated.” *Id.* at cmt. b.

<sup>92</sup> *Id.* § 211(3).

expectation. [The offering party's reason to believe that the term would not be acceptable] may be shown by the prior negotiations or inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view.<sup>93</sup>

This rule and rationale provide a reasoned and balanced starting point for developing a solution to the problems that might arise between commercial parties who have executed contracts in a click-wrap world.

It is important to emphasize that the use of the Doctrine of Reasonable Expectations in connection with click-wrap adhesion contracts does not mean that a party can easily trump terms to which it ostensibly has manifested agreement. Under the formulation of Restatement § 211, terms contained in a standardized form to which assent has formally been expressed by clicking "I agree" shall be interpreted objectively, and will govern the transaction unless the offering party "has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term."<sup>94</sup> However, attempting to restrict the scope of the Doctrine by permitting courts to override a term only when it is so

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<sup>93</sup> *Id.* § 211, cmt. f. Some states use a version of this language to flesh out the Doctrine of Reasonable Expectations in insurance coverage cases. A leading case, *C&J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W. 2d 169, 174-76 (Iowa 1975) (*en banc*), expressly drew from Llewellyn's notion of blanket assent and comment f to Restatement § 211 to formulate a general rule respecting reasonable expectations that could be applied to the insurance policy in question. See also *Clark-Peterson Co. v. Ind. Ins. Assoc.*, 492 N.W.2d 675, 677 (Iowa 1992) (*en banc*):

Originating with *Rodman v. State Farm Mutual Automobile Insurance Co.*, 208 N.W.2d 903, 906 (Iowa 1973), the doctrine has become a vital part of our law interpreting insurance policies. But the doctrine does not contemplate the expansion of insurance coverage on a general equitable basis. The doctrine is carefully circumscribed; it can only be invoked where an exclusion "(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction." *Aid (Mut.) Ins. v. Steffen*, 423 N.W.2d 189, 192 (Iowa 1988); *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 112 (Iowa 1981).

<sup>94</sup> RESTATEMENT (SECOND) OF CONTRACTS, § 211 (3).



odious that the courts can conclude counter-factually that the customer would have withheld assent altogether had it known about the term provides only a veneer of restraint and objectivity.

Courts are likely to find that adjudication is more predictable if they articulate the Doctrine based on the underlying principles, rather than a pretense of counter-factual analysis. Stated in a more forthright and realistic manner, a commercial party should be able to seek relief from the literal terms of a standard form click-wrap agreement only when the term in question is objectively surprising to that party in circumstances where the seller should have known that the term would not be acceptable.<sup>95</sup> The fact that the party seeking relief is a commercial party rather than a consumer should be relevant to determining which expectations are “reasonable,” but the non-consumer nature of the transaction should not preclude the application of the Doctrine.<sup>96</sup>

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<sup>95</sup> With reference to consumer contracts, Russell Korobkin has recently argued that the formulation of Restatement § 211 is not helpful because it is at once too demanding (by focusing on truly outrageous terms that undermine assent altogether) and too lenient (by focusing on the circumstances of the individual buyer rather than adopting a more objective analysis of the class of similarly situated buyers). Korobkin, *supra* note 26, at 1270. Korobkin suggests that the Doctrine of Reasonable Expectations would be better suited to the task, but concludes that it has fallen into desuetude outside the insurance coverage context. *Id.* at 1270–71. Korobkin responds by reconceptualizing the unconscionability defense to deal with the effects of bounded rationality on consumer transactions involving standard form agreements, *id.* at 1278–90, but that is not a plausible strategy for the commercial sphere. Thus, in this article I attempt to articulate how the Doctrine of Reasonable Expectations can be resuscitated in the context of commercial transactions concluded by electronic means.

<sup>96</sup> In recent years, some courts have used the Doctrine of Reasonable Expectations as an interpretive principle to protect consumers from over-reaching literalist interpretations of standard-form contract language by preventing credit card companies from adding arbitration agreements to the governing terms and conditions pursuant to a broad clause in the original agreement that purports to permit the company to amend the agreement after providing notice of the change and an opportunity to opt out. See *Perry v. FleetBoston Fin. Corp.*, 2004 WL 1508518 (E.D. Pa. July 6, 2004) (holding that a card issuer’s attempt to add an arbitration clause to the terms of use by invoking a clause that permitted modification by the card issuer was contrary to the card holder’s reasonable expectations); *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189, 194 (E.D.N.Y. 2004) (same); *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 432 (N.C. App. 2004) (applying Arizona law) (“A customer would not expect that a major corporation could choose to disregard potential contractual opportunities and then later, if it changed its mind, impose them on the customer unilaterally.”); *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 284 (Cal. App. 1998) (deciding the matter on principles of contract interpretation). It stands to reason that a small business using a corporate credit card might successfully make a similar argument under certain circumstances, whereas a huge corporation that annually negotiates its corporate credit card agreement might not. The question should not be decided solely on the basis of the party’s status as a commercial

If our hypothetical tennis entrepreneur finds that her click-wrap agreement to purchase goods from a manufacturer eviscerates her ability to seek redress for breach through a series of provisions regarding mandatory notice of claims, an inconvenient venue for pursuing claims, and a mandatory arbitration process that renders seeking relief pointless, it is entirely appropriate that a court consider whether the Doctrine of Reasonable Expectations should provide some manner of relief. Having lost the ability to deploy the § 2-207 force-field, and in response to a contracting process that intensifies the adhesive character of the transaction to new levels, the Doctrine of Reasonable Expectations can provide a balanced and context-sensitive means for courts to ensure the integrity of the contract as the “bargain in fact” of the parties, rather than as a formalistic concealed weapon that can be unsheathed abruptly by the superior party.<sup>97</sup>

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entity, but rather with regard for the reasonable expectations of the parties to the commercial contract.

Of course, even consumers would be bound to arbitrate disputes pursuant to an amendment to their credit card agreement under circumstances that suggest that this type of amendment was to be reasonably expected, or that the amendment process more closely conforms to a genuine bilateral modification. The court cases mentioned above will likely reinforce contracting practices that are not overreaching and that courts will be inclined to find enforceable. *See, e.g., Beneficial Nat. Bank, U.S.A. v. Payton*, 214 F. Supp. 2d 679, 687 (S.D. Miss. 2001) (distinguishing *Badie* because cardholder was given the opportunity to reject the proposed amendment providing for arbitration of disputes and to continue with the current agreement); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 829 (S.D. Miss. 2001) (same).

This analysis can be rendered more sophisticated by drawing back from the individual contract and considering the effect of the arbitration clause when it precludes a class action in situations where a class action is the only viable means of imposing ex post accountability. *See Samuel Issacharoff & Erin F. Delaney, Credit Card Accountability*, 73 U. CHI. L. REV. 157, 173 (2006) (“Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies.”). It is not a stretch to suggest that parties have a reasonable expectation that there will be some plausible method to assert a claim, and so an arbitration clause designed in part to preclude effective review would properly be subject to judicial scrutiny. In the consumer setting the doctrine of unconscionability provides courts with an additional tool with which to reinforce reasonable expectations, especially under the broader rule in California. *Id.* at 178–80 (discussing *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76, 85–86 (Cal. 2005)); *see also Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); *Acorn v. Household Int’l, Inc.* 211 F. Supp. 2d 1160, 1171 (N.D. Cal. 2002); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Cal. App. 2002).

<sup>97</sup> Article 1 defines “agreement” as the “bargain in fact of the parties,” reflecting the jurisprudence of legal realism that pervades the jurisprudence of Article 2. U.C.C. § 1-201(a)(3) (2006).

Consider a more detailed exploration of this hypothetical. Assume that the tennis entrepreneur electronically orders ten racquets from a manufacturer that has production and distribution facilities around the world. The click-wrap contract contains a number of terms, including a non-disparagement clause and a dispute resolution provision that obligates the buyer to arbitrate any disputes in Switzerland (the location of the manufacturer's world headquarters) under the ICC rules, although the seller retains its right to summary process and repossession in the event of nonpayment. We can assume that the seller has selected these terms in the rational pursuit of its business objectives rather than for the purpose of causing harm to its buyers. We can also assume that the court would find that the electronic contract is valid and binding. With respect to the specific terms, the doctrine of unconscionability would almost certainly have no application to this commercial contract. The question is whether courts should be empowered to enforce the agreement without enforcing some of the specific terms.

The non-disparagement clause would be construed within the commercial setting, including the business purposes served by the clause and its effect on the buyer. It might be perfectly reasonable for all commercial purchasers to expect that they would become agents of the manufacturer in dealing with consumers, and that it is reasonable to expect that their business relationship is founded on the buyer's express commitment to endorse the seller's products. The test of reasonable expectations—whether the term in question is objectively surprising to the buyer in circumstances where the seller should have known that the term would not be acceptable—would necessarily be fact-intensive, but also objective in character. It is helpful to analogize to the merchant definition of Article 2 to clarify the “objective” character of the analysis. Parties are treated as merchants under Article 2 because they hold themselves out to the world as having particular knowledge or skill (whether by dealing in the goods or otherwise), not because they actually have specialized knowledge or skill.<sup>98</sup> In analogous fashion, the tennis entrepreneur may honestly be surprised to discover the full contours of the business context in which

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<sup>98</sup> Article 2 defines “merchant” as “a person, that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction . . .” thereby making clear that dealing in goods is only one way to hold oneself out to the world as a merchant. U.C.C. § 2-104 (1) (2000). The functional, rather than ontological, character of the definition is reinforced by subsection (3), which provides that a contract is between merchants when “both parties are chargeable with the knowledge or skill of merchants.” U.C.C. § 2-104 (3) (2000).

she is dealing, but this fact alone would not be the basis for avoiding the import of contract terms to which she nominally assented by click-wrap contracting.

On the other hand, a dispute resolution provision that can be shown to preclude any effective remedy for breach in virtually every likely scenario that might arise between the parties should be highly suspect. The seller might have ample justification for the provision based on numerous contracts with large, multinational purchasers, but this justification does not apply in the context of the class of buyer in this hypothetical. One would expect that in virtually all cases of a dispute regarding ten racquets, the seller would resolve the dispute informally or at least would not insist on enforcing patently unrealistic and unfair terms to govern a formal resolution of the dispute.

To the extent that the seller sought to enforce the dispute resolution term as written, a court might find good reason to conclude that the term in question is objectively surprising to the buyer in circumstances where the seller should have known that the term would not be acceptable. This result would not necessarily introduce unacceptable uncertainty into the contractual relationship. If the seller wishes to reduce uncertainty about such matters, it can easily calibrate its dispute resolution term to avoid objectively unreasonable features. For example, by providing different procedures and a different venue according to the amount in controversy, a seller could offer an objectively reasonable dispute resolution term that would be enforced as written. Surely it is not asking too much for a seller to offer a different approach to dispute resolution to a small buyer claiming \$150 in damages than it would offer to a large buyer that claims \$1 million in damages.

Determining whether a term was reasonably expected by the parties in light of the commercial circumstances does not require the court to undertake an inquiry that differs radically from the rule under § 2-207(2), which requires the determination of the terms of an agreement when there is a battle of the forms. If commercial parties exchange nonidentical forms to conclude or confirm an agreement, terms that appear on only one of the forms become part of the agreement unless, among other criteria, "they materially alter" the agreement.<sup>99</sup> The Official Comments make clear that this determination amounts to an inquiry into the objective reasonable expectations of the parties by suggesting that the rule seeks to determine whether the additional terms would "result in surprise or

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<sup>99</sup> U.C.C. § 2-207(2)(b) (2000).

hardship if incorporated without express awareness,” or they “involve no element of unreasonable surprise.”<sup>100</sup> This is not to suggest that courts should apply this precise test to a single form in the electronic environment, but rather to emphasize that courts currently are bound to make judgments about the reasonable expectations of commercial parties engaged in a battle of the forms.

## 2. ANSWERING OBJECTIONS TO THE DOCTRINE OF REASONABLE EXPECTATIONS

Critics generally will argue that applying the Doctrine of Reasonable Expectations to sales of goods will undermine the offering party's ability to proceed with confidence on the basis of its desired terms and conditions, but this criticism misses the point that the very nature of a claim under the Doctrine is that the offering party had no reasonable basis to assume that its offered terms would be genuinely accepted by the other party. A party that is advised by its lawyer that the standard terms in its form agreement should eviscerate the other party's right to seek redress for breach of other terms of the agreement has no legitimate basis for disappointment if the courts refuse to enforce these terms. In the far more likely scenario where the offering party has only a vague notion that its lawyer has drafted highly favorable terms to protect it in the event of a dispute, this party suffers no harm if a court construes the form to be enforceable only along lines that more closely resemble what reasonable commercial parties might expect if the agreement had been fully negotiated.<sup>101</sup>

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<sup>100</sup> U.C.C. § 2-207, cmts. 4, 5 (2000).

<sup>101</sup> Commentators have argued that the Model Rules of Professional Conduct are too permissive in these contexts, essentially permitting lawyers to draft oppressive clauses on behalf of their clients. *See, e.g.*, Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002). Carrington opens his article with a strong statement:

Lawyers writing standard form contracts for clients to use in recording transactions with parties not represented by counsel have a professional duty to restrain their zeal. It is my impression that many lawyers are unaware of such a duty. As a consequence, many cause injustice and expose themselves and their firms not only to such appropriate moral sanctions as the contempt of fellow citizens and other lawyers, but also to some risks of tort liability and professional discipline.

*Id.* at 361. But Carrington ultimately concludes with regret that “no language in the text of the ABA's Model Rules of Professional Conduct appears explicitly to authorize professional discipline on lawyers who write unconscionable contracts.” *Id.* at 380.

The critique might be sharpened and refined, with critics insisting that the very essence of standard form agreements is to ensure certainty regarding the enforceable rights and obligations of both parties across a wide variety of transaction partners. Because it is impossible for the offering party to conduct a fact-specific inquiry (even of objective elements) *ex ante* without eliminating the efficiencies of the standard terms, the offering party cannot know whether its standard terms will be enforceable in a given transaction. Returning to the hypothetical, critics would argue that a tennis racquet manufacturer that deals both with large wholesalers and small resellers will be subjected to an uncertain application of its click-wrap terms if courts are empowered to find that some of the terms are enforceable with respect to the former but not the latter. However, this critique remains unpersuasive.

First, it is important to reemphasize the objective nature of the inquiry under the Doctrine, which means that it would be relatively easy for the party to calibrate its terms to relevant objective factors so as to achieve a higher degree of certainty. Moreover, the offering party could present different standard terms to different classes of buyers by using different web applications. This already occurs when sellers seek to differentiate consumer orders from commercial orders by utilizing different web interfaces, including restricted access intranet pages. Large commercial buyers might pre-register to gain access to a non-Internet-based application that would have corresponding terms for the particular class of buyer. Of course, if critics are concerned that the offering party will not be able to secure all of the terms it desires in all of its transactions, this is just to return to the debate over the soul of contract: the entire point of the Doctrine of Reasonable Expectations is to deny the ability of one commercial party to secure enforcement of all manner of terms it desires against another commercial party, unless that party secures genuine assent.

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A recent article argues that the anti-fraud provisions of Rules 1.2, 4.1 and 8.4 permit a more robust restatement of the obligations imposed on lawyers drafting form agreements, concluding that these rules "provide a powerful set of proscriptions against lawyers who intentionally draft or negotiate invalid clauses, fail to advise a client of an invalid or iffy clause, or misrepresent the validity of a clause to a client or another party or person. Rule 2.1 furnishes some compelling reasons why lawyers should counsel their clients more broadly than on legal considerations alone. These rules, however, do not prevent a lawyer from skillfully drafting a clause that is 'close to the edge, but not over,' as long as the lawyer has a good-faith argument as to the clause's validity, supported by a good-faith belief." Christina L. Kunz, *The Ethics of Invalid and "Iffy" Contract Clauses*, 40 LOYOLA L.A. L. REV. 487, 510 (2006).

It is important to emphasize that when a commercial party enters into a contract with knowledge of the terms and their implications, the court should enforce those terms and the Doctrine will have no relevance. In their study of contracts between automobile manufacturers and tier-1 suppliers, Omri Ben-Shahar and James J. White describe the harsh, one-sided terms (including unilateral termination clauses that are essentially unrestricted) that the suppliers are required to accept in order to do business with the manufacturers.<sup>102</sup> These standard terms are nonnegotiable, relatively long-standing, and understood by the suppliers; consequently, they should be enforced except in extreme (and extremely unlikely) circumstances that would probably best be characterized as bad faith enforcement of an otherwise legitimate contract right. The manufacturers do not permit a “battle of the forms” that would vary their standard terms; instead, they insist on an express agreement to their one-sided standard terms.<sup>103</sup>

In such (unusual) circumstances, the use of electronic contracting would not change the analysis. Just as a party today may avoid the “reasonable expectations” rule of § 2-207 by insisting on an express agreement to all of its one-sided terms, a party would be able to secure actual assent to all of its terms in the electronic contracting environment. My point is that courts are wrong to conclude that simply utilizing click-wrap contracting allows the parties to reach this result. The Doctrine of Reasonable Expectations should fill the gap left after the battle of the forms has ended; however, this does not mean that the Doctrine should supplant genuine express agreements to standard terms, even if they are one-sided.

This line of reasoning invites us to return to the starting, and sticking, point. The thesis of this article is that when a commercial party clicks “I agree,” it is not necessarily equivalent to the tier-1 manufacturer agreeing to General Motor’s well-known and understood standard terms. Put plainly, it is a mistake to conclude that the elimination of the battle of the forms in electronic contracting is equivalent to the insistence of General Motors that it receive its standard terms by refusing to engage in the battle of the forms. The technology of electronic assent reflects greater degrees of organization and efficiency, but does not always reflect a higher degree of actual assent. The literature regarding consumer transactions suggests that

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<sup>102</sup> Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006).

<sup>103</sup> *Id.* at 967–68.

assent is actually weakened in the electronic environment.<sup>104</sup> It stands to reason that, if true, this dynamic would also hold true at least for some commercial parties such as the tennis entrepreneur. The Doctrine of Reasonable Expectations might be difficult to deploy in consumer settings, and may be largely duplicative of other doctrinal and statutory protections, but the Doctrine can be deployed in a predictable manner in the commercial setting to fill the void as § 2-207 becomes irrelevant. This approach would also forestall any tendency of courts to question the "blanket assent" reflected in the electronic contracting process as the means for policing unacceptable terms. In this sense, the Doctrine would ensure recognition of the existence of a bargain and thereby facilitate electronic contracting.

Courts should employ the Doctrine of Reasonable Expectations as a feature of general contract law that reaffirms the principles underlying the recognition and enforcement of consensual obligations. The Supreme Court of Arizona, sitting en banc, responded to the then newly drafted Restatement (Second) of Contracts by emphasizing that developing the Doctrine of Reasonable Expectations as a general feature of contract law, rather than solely as a safety valve to benefit insurance policyholders, simultaneously ensures the integrity of the Doctrine and maintains the certainty of contract relations. The court began by noting that confining judicial review to a literal textual analysis of adhesion form contracts is no longer plausible: "At best, such reasoning, based on patently unfounded assumptions of intent, is result oriented; at worst, it makes no sense."<sup>105</sup> Baldly stated, the Doctrine "is quite troublesome, since most insureds develop a 'reasonable expectation' that every loss will be covered by their policy," but the court found suitable grounding for the Doctrine in the conceptual work of Llewellyn and Corbin, as reflected in Restatement § 211.<sup>106</sup>

This treatment of insurance law is neither radical nor new. All that is new in the "changed" Restatement is the articulation of the rule. . . .

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<sup>104</sup> See *supra* note 26.

<sup>105</sup> *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 393-94 (Ariz. 1984) (*en banc*).

<sup>106</sup> *Id.* at 395.



In adopting this rule, we do not create a special field of contract law, we merely adopt a rule of integration [of the agreement in written form] which recognizes the method by which people do business. . . .

The rule adopted today recognizes reality and the needs of commerce; it allows businesses that use such forms to write their own contract. It charges the customer with knowledge that the contract being “purchased” is or contains a form applied to a vast number of transactions and includes terms which are unknown (or even unknowable); it binds the customer to such terms. However, the rule stops short of granting the drafter of the contract license to accomplish any result. It holds the drafter to good faith and terms which are conscionable; it requires drafting of provisions which can be understood if the customer does attempt to check on his rights; it does not give effect to boilerplate terms which are contrary to either the expressed agreement or the purpose of the transaction as known to the contracting parties. From the standpoint of the judicial system, the rule recognizes the true origin of standardized contract provisions, frees the courts from having to write a contract for the parties, and removes the temptation to create ambiguity or invent intent in order to reach a result. . . .

To apply the old rule and interpret such contracts according to the imagined intent of the parties is to perpetuate a fiction which can do no more than bring the law into ridicule. To those troubled by the change in the law, we point out that the fundamental change occurred first in business practice. The change in legal analysis does no more than reflect the change in methods of doing business. To acknowledge standardized contracts for what they are—rules written by commercial enterprises—and to enforce them as written, subject to those reasonable limitations provided by law, is to recognize the reality of the marketplace as it now exists, while imposing just limits on business practice. These, we think, have always been the proper functions of contract law.<sup>107</sup>

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<sup>107</sup> *Id.* at 397–99. Jeff Stempel has argued persuasively that the Doctrine of Reasonable Expectations has been misconstrued narrowly and should instead be regarded as a general principle of contract interpretation that is not limited to the “strong” application of overcoming clearly worded policy language. Jeffrey W. Stempel, *Unmet Expectations*:

Judicial protection of reasonable expectations under click-wrap commercial contracts is simply a new iteration of the protections formerly provided by § 2-207 and is grounded in basic principles of contract law.<sup>108</sup>

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*Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181 (1998). Construed in this manner, the Doctrine would naturally be viewed as a part of general contract law.

<sup>108</sup> Judicial interpretation of § 2-207 has been guided by an effort to effectuate the underlying purpose of protecting reasonable expectations of commercial parties. In its (relatively late) “first opportunity to consider a classic ‘battle of the forms’ scenario,” the Supreme Court of New Mexico articulated the reasonable expectations interpretation of § 2-207 clearly and persuasively. *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 320 (N.M. 1993). The court endorsed the modern approach to the contract formation rules of § 2-207, with the following explanation:

Discerning whether “commercial understanding” dictates the existence of a contract requires consideration of the objective manifestations of the parties’ understanding of the bargain. . . . The question guiding the inquiry should be whether the offeror could reasonably believe that in the context of the commercial setting in which the parties were acting, a contract had been formed. This determination requires a very fact specific inquiry. . . . Our analysis does not yield an iron clad rule conducive to perfunctory application. However, it does remain true to the spirit of Article 2, as it calls the trial court to consider the commercial setting of each transaction and the reasonable expectations and beliefs of the parties acting in that setting.

*Id.* at 324.

It is important to emphasize that courts must apply the Doctrine of Reasonable Expectations in a manner that does not focus solely on the subjective expectations of the complaining party. James White argued forcefully against the revisions to Article 2 that would have adopted the “subjective” test of reasonable expectations seemingly embedded in Article 2.20 of the UNIDROIT principles, suggesting that this would wreak havoc for businesses. See James J. White, *Form Contracts Under Revised Article 2*, 75 WASH U. L.Q. 315 (1997). White properly challenges the move from the rule of Restatement § 211(3) that relief is available only if the party would not have agreed to the contract at all to the UNIDROIT rule focusing on whether the party could have expected the term in question, but in this article I propose a middle (still objective) ground. My proposal fits comfortably within the scheme of Article 2 and reinstates the beneficial features of the § 2-207 force-field.

Professor White offers a more telling criticism, though, because his analysis shows that the courts in Arizona in fact adopted the subjective approach of the proposed revision to Article 2 despite their ostensible reliance on Restatement § 211(3) as a general rule of contract law. Any common law doctrine is subject to abuse and misapplication, and so to this criticism, all that I can suggest is Llewellyn’s familiar belief that covert tools are unreliable tools, and that we would be far better off for courts to develop a jurisprudence of

The Doctrine of Reasonable Expectations fits within the conceptual structure of Article 2, as it is no more radical than the statutory definition of “agreement,” which includes, but is not limited to, the elements of “course of performance,” “course of dealing” and “trade usage,” terms that clearly respect reasonable expectations and reject a formalist approach to understanding the agreement. In the *Nanakuli* case, the Ninth Circuit famously held that the price term “posted price at time of delivery” was to be construed as a price protection term that meant “posted price at time of delivery, but no higher than the posted price at time of contracting,” in accordance with the reasonable expectations of both parties generated by the course of dealing between the parties and established trade usages.<sup>109</sup>

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reasonable expectations openly, and therefore subject to the kind of analysis and criticism that White offers.

<sup>109</sup> See *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 780 (9th Cir. 1981). This result might lead a casual observer to conclude that Article 2 pays insufficient heed to the need for certainty and predictability in commercial transactions, but the *Nanakuli* court was careful to apply the Code as written and intended: a course of dealing is established only where the prior interactions are “fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct,” U.C.C. § 1-303(b) (2006), and a trade usage is established only when the “regularity” of its observance is such as to “justify an expectation that it will be observed with respect to the transaction in question,” U.C.C. § 1-303(c) (2006).

It is difficult to argue that the course of dealing and trade usage should not be part of the agreement, although one might be skeptical as to whether the factual basis for this evidence has been established. See, e.g., Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715 (1999). Bernstein states that “[u]sages of trade” and “commercial standards,” as those terms are used by the Code, may not consistently exist, even in relatively close-knit merchant communities. While merchants in the industries examined here sometimes do and did act in ways amounting to loose behavioral regularities, most such regularities are either much more geographically local in nature or far more general in scope and conditional in form than is commonly assumed. *Id.* But see Macaulay, *supra* note 37, at 788.

Bernstein's empirical findings raise questions of evidence rather than challenge the entire approach of the U.C.C. Why isn't it enough to say that one who wants to rely on a usage must prove it? Professor Bernstein's admirable empirical work suggests that more often than we would have thought, a party will not be able to carry its burden of proving the existence and content of a usage.

Macaulay notes that there certainly are trade usages that should be enforced (for example, an order for a “2 by 4” is satisfied when the seller provides a piece of wood measuring approximately 1 3/4” by 3 1/2”), and in particular he comments on the compelling facts that justify the result in *Nanakuli* as being consistent with the agreement of the parties. *Id.* at 794–95. See also David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617 (2001).

Courts should extend the protection of “reasonable expectations” to the electronic contracting arena where parties are no longer protected by the force-field protections of § 2-207.

Although Article 2 embodies the principle of protecting reasonable expectations in many of its provisions, there is no clause akin to Restatement § 211 that would directly authorize an analysis of click-wrap contracts through this lens. Nevertheless, there is ample basis for courts to apply the Doctrine to transactions involving the sale of goods.<sup>110</sup> First, the U.C.C. “must be liberally construed and applied” so as to “simplify, clarify, and modernize the law” and “to permit the continued expansion of commercial practices.”<sup>111</sup> Inasmuch as the Doctrine of Reasonable Expectations is the best means for facilitating the legal regulation of a new form of contracting that has outstripped the force-field protection of § 2-207, courts are authorized to utilize the Doctrine to guide application of the provisions of Article 2. Second, the “principles of law and equity” relating to “validating or invalidating” causes continue to supplement the U.C.C. unless they have been displaced by a particular provision of the U.C.C.<sup>112</sup> There simply is no sound basis to argue that the Doctrine of Reasonable Expectations has been displaced by the U.C.C. The definition of “agreement” looks to the commercial reality of the “bargain in fact” that engenders contractual expectations. The obligation of good faith requires both parties to observe “reasonable commercial standards of fair dealing,”<sup>113</sup> which amounts to the obligation to respect the other party’s reasonable expectations in the performance and enforcement of the contract. Moreover, Article 2 provides numerous gap filling

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<sup>110</sup> Llewellyn argued that the U.C.C. invited the enforcement of reasonable expectations through the general tools of good faith and unconscionability, and also by providing a model of protecting reasonable expectations in the many gap-filling provisions. LLEWELLYN, *supra* note 1, at 369–70. There is precedent for utilizing the doctrine to clarify troubling provisions in Article 2. John Murray cogently argues that the only reliable means of interpreting the “part of the basis of the bargain test” under U.C.C. § 2-313 is to regard the test as a determination of the “reasonable expectations of the buyer.” John E. Murray, Jr., ‘Basis of the Bargain’: *Transcending Classical Concepts*, 66 MINN. L. REV. 283, 317–18 (1982).

<sup>111</sup> U.C.C. § 1-103(a)(1) and (2) (2006).

<sup>112</sup> U.C.C. § 1-103(b) (2006). For this reason, the U.C.C. is not a true code that displaces all other law with respect to transactions within its scope. Comment 2 explains that “principles of common law and equity may supplement its provisions,” but “they may not be used to supplant its provisions, or the purposes and policies those provisions reflect.”

<sup>113</sup> U.C.C. § 1-201(a)(20) (2006).

provisions that embody rules respecting the reasonable expectations of the parties.<sup>114</sup> Finally, the provisions governing the formation of a sales agreement embrace a functionalist, rather than formalist, conception of contracting and should not be interpreted to demand a traditional contract analysis of click-wrap contracting.<sup>115</sup>

One can argue that applying the Doctrine of Reasonable Expectations to contracting under Article 2 is an unwarranted break with the statutory scheme only if one unrealistically (which is to say, without historical or textual support) reads a strict formalist approach to contracting into Article 2. As Allen Kamp has related, Article 2 was crafted in a functionalist time but was finalized and adopted in a formalist period, leading to a “freedom of contract” overlay on a “reasonable expectations” code.<sup>116</sup> Article 2’s polysemic character permits the judiciary to balance the values of freedom of contract and the protection of reasonable expectations. There certainly is nothing

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<sup>114</sup> See, e.g., U.C.C. § 2-305(1) (2000) (if not otherwise agreed, the price of the goods is a “reasonable price at time of delivery”); U.C.C. § 2-308(a) (2000) (if not otherwise agreed, the goods are to be tendered at the seller’s place of business); and U.C.C. § 2-309 (1) (2000) (if not otherwise agreed, the time for any action to be taken under a contract is “a reasonable time.”). These provisions articulate what the parties would reasonably expect in the absence of agreement (broadly defined): the goods are tendered without having to be moved, and are sold for a reasonable price within a reasonable time.

<sup>115</sup> A contract is formed in any manner sufficient to show “agreement” (as defined, *supra* note 96 and the text accompanying note 106), and need not provide all of the necessary terms of the agreement so long as the parties intend to be bound and “there is a reasonably certain basis for giving an appropriate remedy.” *Id.* at § 2-204 (1), (3). Courts can legitimately use the Doctrine of Reasonable Expectations in click-wrap cases to determine what “agreement” has been shown by the parties as to specific terms, without undermining the “agreement” that is designated in the form of a “blanket assent.” As would happen formerly under the “knock-out” rule of § 2-207, in the absence of agreement on a particular term, the U.C.C.’s gap-filling provisions would control.

<sup>116</sup> After World War II, the collectivist, anti-laissez-faire ideals of the thirties faced the new challenge of McCarthyism. Any admission or hint that the newly proposed commercial code was even remotely based on collectivist theories, or that it worked against individual bargaining, would have been disastrous. As we have seen, freedom of contract, or at least an individual’s freedom of contract, is not a principle of the U.C.C. A merchant’s freedom to bargain is hemmed in by “reasonableness,” the standard of good faith, the use of standard terms and meanings and non-disclaimable usage of trade. The U.C.C., however, could not explicitly recognize these. The U.C.C. was proposed for adoption in the fifties, which was the worst time to mention the Code’s bias against individual bargaining. Therefore, the U.C.C.’s explicit references to freedom of contract were added in the fifties for political reasons. Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALBANY L. REV. 325, 395 (1995).

in the text, purpose, or history of Article 2 that compels courts to adopt the Doctrine of Reasonable Expectations as proposed in this Article, but there is even more certainly nothing in the text, purpose, or history of Article 2 to preclude courts from doing so.

James Maxeiner has argued persuasively that the contemporary American debate about standard form contracts has ignored the rich history that European countries, especially Germany, have developed in this area.<sup>117</sup> In the postwar years, German courts utilized general Code provisions similar to the doctrines of good faith and unconscionability to begin systematically addressing the problem of standardized terms.<sup>118</sup> Maxeiner suggests that Llewellyn found inspiration for his theory of blanket assent in this case law, just as he found inspiration for the unconscionability provision of the U.C.C. in German case law from the prewar years. The German legislature codified established case law principles in 1976; during the following two decades the German Supreme Court decided more than 1,500 cases under the new provisions resulting in a robust jurisprudence in this area.<sup>119</sup>

The German code distinguishes “incorporation controls” from “content controls.” Incorporation controls require that the terms were available to a party at the time of contracting, and probably are satisfied by modern click-wrap contracting.<sup>120</sup> Content controls are

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<sup>117</sup> James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L LAW 109 (2003). Maxeiner discusses the adoption and implementation of EU Council Directive 93/13/EEC of April 5, 1993, that was designed to control unfair terms in consumer contracts. This EU initiative drew from the broader German experience that was not limited to the consumer context. Maxeiner’s point is that the Article 2 revision debacle occurred in virtually complete ignorance of these foreign approaches and developments. He laments that the members of ALI and NCCUSL (now known as the ULC) “would have been able to observe standard terms control systems more extensive than section 2-302 in actual operation; they would not have had to guess whether such a system was even possible.” *Id.* at 129. See also Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEVE. ST. L. REV. 175 (2006) (emphasizing consumer protection afforded by EU Directives); Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT’L L.J. 223 (2006) (analyzing the trend in foreign law to protect consumers from strong sellers and arguing that the amendment process for Article 2 would have benefited by drawing from these sources).

<sup>118</sup> Maxeiner, *supra* note 117, at 141–46.

<sup>119</sup> *Id.* at 149–51.

<sup>120</sup> *Id.* at 151–52, 166.

multilayered: one provision bans certain terms, another identifies suspect terms, and a third permits courts generally to invalidate terms that, contrary to the principle of good faith, place either party in an unreasonably disadvantaged position through obfuscation, by deviating materially from baseline legal norms, or by undermining the purpose of the contract.<sup>121</sup> Maxeiner argues that the statutory provisions that evolved out of judicial interpretations of the German Code demonstrate the feasibility of regulating standard form agreements in a modern economy.

Functioning systems for control of unfair standard terms exist in Europe. These systems are more ambitious than the present-day American system. Their very existence challenges complacency with current American law. Their existence undermines the two principal arguments raised to support American law: there is no problem, and no system could better balance the competing interests of certainty of contract and fairness of terms. Obviously, our European colleagues think that there is a problem, and they have taken action to deal with it. The apparent success of the German contract model suggests that there may not be a necessary trade-off between control of unfair terms and predictable contracting.

If the American system is less ambitious than its European counterparts and is largely limited to striking down terms that “shock the conscience,” it has not been by design. When American legislatures enacted U.C.C. section § 2-302, they adopted a provision that its drafters hoped would allow American courts to develop “machinery” for “policing” contract terms. The German Supreme Court’s development of such machinery from essentially the same starting point largely confirms the vision of the drafters of the U.C.C.<sup>122</sup>

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<sup>121</sup> *Id.* at 152–56. Section 305(1) provides that terms “individually negotiated between the parties” are not standard terms, and § 305(2) incorporates standard terms “only if” the drafter “expressly draws the other party’s attention to them,” and “gives the other party . . . the possibility of gaining knowledge of their content, and if the other party agrees that they are to apply.” *Id.* at 177.

<sup>122</sup> *Id.* at 171–72. Section 308 specifies clauses whose validity depends upon an evaluation by courts, and § 309 specifies clauses that are invalid. *Id.* at 178–79. The general content control provision of § 307 provides as follows:

The German experience shows that efforts to delineate principles of general contract law able to take into account the realities of modern contracting are not radical efforts to be feared; rather, they are organic developments that hold true to the conceptual structure of contract law.

Maxeiner's arguments in favor of a legislative solution or a reinvigoration of unconscionability doctrine are not persuasive in the current context, for reasons discussed above. Given the angst surrounding the revision of Article 2, it is highly implausible at this time that a sober and balanced legislative solution can be achieved.<sup>123</sup> Moreover, the doctrine of unconscionability has been cast as a specialized consumer protection device; as such, it is unlikely to serve as a compelling basis for dealing with commercial contracts. However, Maxeiner's analysis does lend strong support to my argument that courts should develop the Doctrine of Reasonable Expectations as a general feature of contract law to govern commercial parties engaged in electronic contracting.

#### IV. CONCLUSION

The Doctrine of Reasonable Expectations, as embodied in Restatement § 211, is similar to the German regulation of standard form agreements. Both focus on avoiding unfair surprise and the evisceration of dickered terms. Llewellyn's solution to the battle of the

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(1) Provisions in standard terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage. An unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible.

(2) In case of doubt, an unreasonable disadvantage is assumed if a provision 1. can not be reconciled with essential basic principles of the statutory rule from which it deviates, or 2. restricts essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved.

*Id.* at 178.

<sup>123</sup> Llewellyn would almost certainly argue that, in the present circumstances, courts must take the lead by fashioning a response to the emerging contracting conditions. Any future legislative solution should work from this judicial basis and facilitate additional creative applications of the statutory principles to dynamic commercial settings. See *supra* note 84. This is the nature of Article 2: it was crafted on the basis of the wisdom generated by judicial interpretations of the Uniform Sales Act and was drafted to ensure that courts continued to apply the provisions with attention to context.



forms famously divides the question of whether there is a contract from a determination of the terms; as § 2-207 fades from relevance, the policing of commercial contracts should continue to divide questions of incorporation and control when dealing with click-wrap contracts. In short, the lessons that comparative commercial law might teach American judges fit well with the developing history and guiding principles of Article 2, and are best framed by the Doctrine of Reasonable Expectations.

All this having been said, and despite an expected vocal protest that my thesis will lead to unbounded litigation, I predict that the circumstances in which a commercial party has a viable claim that one or more click-wrap terms should not be enforced under the Doctrine of Reasonable Expectations will be relatively rare. This was also the case in the battle of the forms scenario, where parties exchanged forms and then dealt with each other with business goals in mind. As ultimately construed and applied, § 2-207 was beneficial when the business relationship soured and parties sought a realistic interpretation of their bargain and a determination of their respective duties. The Doctrine of Reasonable Expectations can serve a similar role by regulating click-wrap contracting for goods. It is time for both the courts and commentators to recall the wisdom of Llewellyn and others at the dawn of the widespread use of standard-form adhesion contracts, to draw from the contemporary experiences of other highly industrialized countries, and begin at long last to articulate the contours of the Doctrine of Reasonable Expectations.

